RECORD OF TRIAL

COVER SHEET

IN THE
MILITARY COMMISSION
CASE OF

UNITED STATES
V.
ALI HAMZA AHMAD SULAYMAN AL BAHLUL

ALSO KNOWN AS:

ALI HAMZA AHMED SULEIMAN AL BAHLUL
ABU ANAS AL MAKKI
ABU ANAS YEMENI
MOHAMMAD ANAS ABDULLAH KHALIDI

NO. 040003

VOLUME ___ OF ___ TOTAL VOLUMES

4TH VOLUME OF REVIEW EXHIBITS (RE):
RES 173-192 (APR. 7, 2006 SESSION)
(REDACTED VERSION)

United States v. Ali Hamza Sulayman al Bahlul, NO. 040003

INDEX OF VOLUMES

A more detailed index for each volume is included at the front of the particular volume concerned. An electronic copy of the redacted version of this record of trial is available at http://www.defenselink.mil/news/commissions.html.

Some volumes have not been numbered on the covers. The numerical order for the volumes of the record of trial, as listed below, as well as the total number of volumes will change as litigation progresses and additional documents are added.

After trial is completed, the Presiding Officer will authenticate the final session transcript and exhibits, and the Appointing Authority will certify the records as administratively complete. The volumes of the record of trial will receive their final numbering just prior to the Appointing Authority's administrative certification.

Transcript and Review Exhibits are part of the record of trial, and are considered during appellate review. Volumes I-VI, however, are allied papers and as such are not part of the record of trial. Allied papers provide references, and show the administrative and historical processing of a case. Allied papers are not usually considered during appellate review. *See generally United States v. Gonzalez*, 60 M.J. 572, 574-575 (Army Ct. Crim. App. 2004) and cases cited therein discussing when allied papers may be considered during the military justice appellate process, which is governed by 10 U.S.C. § 866). For more information about allied papers in the military justice process, see Clerk of Military Commission administrative materials in Volume III.

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II*	Supreme Court Decisions: *Rasul v. Bush*, 542 U.S. 466 (2004); *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866)
III*	DoD Decisions on Commissions including Appointing Authority

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[†] **Interim volume numbers. Final numbers to be added when trial is completed.**

UNITED STATES V. SALIM AHMED HAMDAN—REVIEW EXHIBITS

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UNITED STATES V. ALI HAMZA AHMAD SULAYMAN AL BAHLUL, NO. 040003—4TH VOLUME OF REVIEW EXHIBITS

UNITED STATES OF AMERICA	)	PO 104 A
v.	)	MODIFICATION TO PO 104 DISCOVERY ORDER
ALI HAMZA AHMAD SULAYMAN AL BAHLUL	)	7 March 2006

1. This filing modifies PO 104 (Discovery Order).

2. If either party objects to this modification, they shall file a motion in accordance with POM 4-3 not later than 22 March 2006.

3. Add the following to paragraph 10, PO 104:

a. If a matter required to be disclosed is in electronic form, it shall be provided to the opposing party in the same electronic form, unless the disclosing party is unable to do so as a result of a circumstance beyond that party's control, such as a proprietary program being unavailable to the parties, security considerations, or other similar limitation. In the event electronic matter is provided in a different form, the reason for doing so shall be specifically set forth in a transmittal document.

b. Electronic "searchability" of documents.

(1) It is generally not possible to create a completely accurate, text-searchable document using Optical Character Recognition (OCR) or other software, and no party is required to vouch that a text search of any electronic document disclosed by that party will be 100% accurate. While providing documents and other evidence in electronic form is the preferred method of disclosure, and while electronic text searching is a useful technology, it is not a substitute for reading or viewing the matter disclosed. A party receiving information in electronic media is responsible for reading all such information.

(2) Matter shall be considered to have been disclosed pursuant to this Discovery Order when the matter provided is viewable either as displayed on a computer monitor, printed, or in other hard copy form, regardless of whether an electronic text search reveals any particular information that is the object of a text search.

(3) At no time may a party convert a text-searchable or OCR document before serving it on the opposing party in order to prevent the opposing party from using text-search software or tools.

4. Change paragraph 12.c. to read:

c. "Synopsis of a witness' testimony" is that which the sponsoring counsel has a good faith basis to believe the witness will say, if called to testify.

(1) A synopsis shall be prepared as though the subject witness is speaking (in the first person), and shall be sufficiently detailed as to demonstrate both the testimony's relevance and that the witness has personal knowledge of the matter being offered into evidence. *See* Enclosure 1, POM 10-2 for suggestions.

(2) If any matter that has been disclosed to an opposing party contains a complete synopsis of a witness' testimony, the document is identified by Bates stamp number or otherwise, and the location of the document is reasonably described, no additional synopsis is required to be disclosed, provided that the witness list refers to the matter as containing the synopsis. If a document contains a synopsis of only a portion of a witness' testimony, that document shall be identified as described above, but a synopsis must be provided to the opposing party setting forth any additional matter about which the witness is expected to testify.

IT IS SO ORDERED:

/s/
Peter E. Brownback, III
COL, JA, USA
Presiding Officer

Hodges, Keith

From: Hodges, Keith[redacted]
Sent: Friday, March 10, 2006 5:52 PM
To: Fleener, Tom, MAJ DoD GC; Hodges, Keith; Davis, Morris, COL, DoD OGC;[redacted] Sullivan, Dwight, COL, DoD OGC;[redacted]
Subject: PO Decision: Defense Request for extension of time

By a separate email, the Presiding Officer sent the below to me. I have copied it exactly as provided it and pasted it into this email to maintain the thread of the request and the addressing.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges

Mr. Hodges,

Please forward this email to MAJ Fleener and all others concerned.

COL Brownback

MAJ Fleener,

1. Each time that you have been tasked to accomplish something, you have been given a date by which the task must be accomplished.
Neither the Presiding Officer nor the Assistant to the Presiding Officers is responsible for keeping your work calendar in order. This email does not serve to state that the below information captures all of your due dates. You are responsible for your own due dates.

2. You are making certain choices concerning your duty and your desires. You will note that you are already past due on certain discovery matters, you delivered the request to withdraw memorandum late, and you have not yet, to my recollection, completed a task on time. Consequently, I am not inclined to grant any delay to you other than that noted below.

3. The matters which you mention in paragraphs 7a-e are matters which could have been foreseen. To the extent to which they could not have been foreseen, it seems they could have been resolved by working past "normal" duty hours, using the telephone, or other measures.

4. If you wish to review your materials, determine the matters in which you are delinquent, prioritize your efforts and your time available, and then request a delay on a specific matter noting the due date, a specific date you can complete the matter, and reasons why the delay is necessary, you may do so. It appears that your global request for a general extension to everything is unwarranted.

5. As to the requests contained in your email below:

a. Your paragraph 1. The Defense does need to respond to the Motion to Compel Discovery filed this week. I grant you an extension until 24 March to do so. If you have a Discovery Request to make, make it not

later than 31 March.

b. Your paragraph 2. If you wish to brief the self-representation issue, do so not later than 31 March.

c. Your paragraph 3. As I stated on the record on 1 March 2006, you have until 22 March 2006 to supplement your request that I grant your challenge for cause. You may raise whatever matters you so desire with the Appointing Authority; however, I do not see any reason that your dealings with the Appointing Authority should cause a delay in the Commission proceedings.

d. Your paragraph 4. I grant you an extension until 23 March to fulfill your responsibilities with respect to the draft session transcript that was served on you.

e. Your paragraph 5. You are advised to go through your emails and other materials and make a list of what is due when. If you wish assistance from the Assistant, make a request directly to him setting forth the specific reasons why you do not know what matters are due when.

f. Your paragraph 6. Your request is granted in part and denied in part as indicated by paragraphs 5-a-e above.

6. Reference your paragraph 7(e). Advise not later than 23 March all the measures you have taken to obtain another counsel in this case.
Ensure you include copies of any requests that you have provided the Chief Defense Counsel for such assistance, since he is the one responsible for detailing defense counsel.

7. You will also be prepared to come to Guantanamo for a session to be held during the trial term beginning on 3 April 2006. At this session, I will be able to measure, on the record, your progress or lack thereof in the matters which you have before you. I will also be able to learn from you and the Chief Defense Counsel the progress being made in getting an assistant counsel on the case.

Peter E. Brownback III
COL, JA, USA
Presiding Officer

From: Fleener, Tom, MAJ DoD GC[redacted]
Sent: Fri 3/10/2006 3:24 PM
To: 'Hodges, Keith'; Davis, Morris, COL, DoD OGC;[redacted] Sullivan, Dwight, COL, DoD OGC; Fleener, Tom, MAJ DoD GC;[redacted]
Subject: Request for extension of time

1. Defense believes it needs to respond to Prosecution Request for Discovery and make its own Discovery Request.

2. Defense believes it needs to brief the Presiding Officer on the self-representation issue.

3. Defense believes it needs to brief the Appointing Authority (and maybe the PO?) regarding its motion for the PO to recuse himself.

4. Defense believes it needs to conduct Errata.

5. Defense is unsure of what deadlines have been imposed on all the above.

6. Defense requests a extension of time until March 31 to comply with the above.

7. Reasons for this request are as follows:

a) Defense spent the first part of this week in GTMO where, unfortunately, there were problems with computers/phones/printers. Consequently, very little productive office work was conducted.

b) The flight on Wed from GTMO to the states aggravated my root canal and forced me to spend yesterday at the dentist office and then resting at home.

c) Today, our computers have been down.

d) Next week I have scheduled a vacation where I will be unable to do work.

e) I am still the only attorney on this case.

8. Please advise.

Major Tom Fleener

Hodges, Keith

From: Hodges, Keith[redacted]
Sent: Friday, March 10, 2006 5:21 PM
To: Fleener, Tom, MAJ DoD GC;[redacted]

Subject: Errata versus redaction

Within the next hour, you will receive an answer from the Presiding Officer for the extensions of time. Stay by your computer.

As to the below:

1. The procedures for errata are set out in POM 13-1 dated 26 Sep 2005.

2. Reaction is a process whereby the Chief Clerk for Military Commissions decides what will be PUBLICLY posted and be made publicly available. read the memo Mr. Harvey sent you.

4. Your apparanet confusion on filings versus REs does not take into account that sometimes the same documents are made a part of the record more than once to enure completeness.

5. The below email does not consitute a request for relief as it has not been filed in accordance with POM 4-3.

6. If there is a better way, you are welcome to suggest it.

Keith Hodges
Assistant

From: Fleener, Tom, MAJ DoD GC[redacted]
Sent: Fri 3/10/2006 4:38 PM
To:[redacted]
Subject: RE: Request for extension of time

What is the difference between making comments and doing errata? Are these essentially two identical transcripts -one redacted one not? If so, why? Why can there not be one transcript where we do errata? Whose job is it to determine what needs to be redacted, mine? If so, I have no idea what needs to be redacted.

Forgive me for sounding off, but the root canal is killing me and this is not helping.

For instance, I was flipping through what appears to be the ROT and it looks like PO 102, RE 101 and RE 128 are the same documents. However, for some reason RE128 is 6 pages shorter. There has got to be a better system than this.

Everything in this process is new. Everything. It takes 10 times longer than it should take to do anything. And this is still way early in the process.

There has got to be a better way.

Tom Fleener

-----Original Message-----
From: Harvey, [redacted] Mr, DoD OGC
Sent: Friday, March 10, 2006 16:09
To: Fleener, Tom, MAJ DoD GC; 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; [redacted]
Subject: RE: Request for extension of time

Major Fleener,

1. Your comments pertaining to the redacted, draft transcript R. 139-406, and REs 141-172 (that will be posted on the PA website) are due by 1700, Tuesday, 21 March. I cannot approve any additional delay.

2. Please contact the Presiding Officer for an extension regarding submission of errata for the draft transcript, prior to his authentication.

M. Harvey
CCMC

-----Original Message-----
From: Fleener, Tom, MAJ DoD GC
Sent: Friday, March 10, 2006 15:53
To: [redacted]
Subject: RE: Request for extension of time

Mr. Harvey,

I was unable to print out the transcripts while in GTMO. My computer is just now 4pm on Friday working. I am gone all of next week.

I need another week at least to get these things to you.

Tom Fleener

-----Original Message-----From: Harvey, [redacted] Mr, DoD OGC
Sent: Friday, March 10, 2006 15:40
To: Fleener, Tom, MAJ DoD GC; 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; [redacted]

[redacted]

Subject: RE: Request for extension of time

Major Fleener,

Your comments pertaining to the redacted, draft transcript that will be posted on the PA website were due this morning at 0800. Please provide your comments by COB, Tuesday, 14 March.

Your comments/errata on the draft session transcript are due 18 March. If you need more time, you will have to obtain the Presiding Officer's approval.

Thanks,

M. Harvey
CCMC

-----Original Message-----
From: Fleener, Tom, MAJ DoD GC
Sent: Friday, March 10, 2006 15:25
To: 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; [redacted]

Subject: Request for extension of time

1. Defense believes it needs to respond to Prosecution Request for Discovery and make its own Discovery Request.

2. Defense believes it needs to brief the Presiding Officer on the self-representation issue.

3. Defense believes it needs to brief the Appointing Authority (and maybe the PO?) regarding its motion for the PO to recuse himself.

4. Defense believes it needs to conduct Errata.

5. Defense is unsure of what deadlines have been imposed on all the above.

6. Defense requests a extension of time until March 31 to comply with the above.

7. Reasons for this request are as follows:

a) Defense spent the first part of this week in GTMO where, unfortunately, there were problems with computers/phones/printers. Consequently, very little productive office work was conducted.

b) The flight on Wed from GTMO to the states aggravated my root canal and

forced me to spend yesterday at the dentist office and then resting at home.

c) Today, our computers have been down.

d) Next week I have scheduled a vacation where I will be unable to do work.

e) I am still the only attorney on this case.

8. Please advise.

Major Tom Fleener

UNITED STATES OF AMERICA	**P - ____ al Bahlul**
v.	**Prosecution Motion** to Compel Defense Discovery
ALI HAMZA SULAYMAN AL BAHLUL	**10 March 2006**

1. Timeliness. This motion is being filed within the time guidelines of POM 4-3, 20 Sep 05.

2. Relief Sought. The prosecution requests that the Presiding Officer compel defense discovery that was due 6 March 2006 within 14 days, subject to the enforcement of an order in limine concerning matters not properly provided to the prosecution in discovery.

3. Overview. The Presiding Officer issued a Discovery Order (PO 104) on 23 January 2006, which required the defense to provide discovery to the prosecution no later than 6 March 2006. To date the defense has neither complied with any portion of Discovery Order (PO 104), nor requested any extension of time for doing so.

4. Burden of Proof. The burden is upon the moving party to show non-compliance by a preponderance of the evidence.

5. Facts. The Presiding Officer issued Discovery Order (PO 104) on 23 January 2006, which required the defense to provide the following to the prosecution no later than 6 March 2006:

a. Evidence and copies of all matters the defense intends to offer at trial.

b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness

adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.

f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

6. To date, the defense has neither complied with any portion of Discovery Order (PO 104), nor requested or received any extension of time, despite being reminded by the Presiding Officer of their obligations of timeliness at the commission hearing of 1-2 March 2006. The prosecution is unable to complete preparation for litigation in a timely fashion absent the defense being compelled to comply with discovery.

7. Additional Information. None.

8. Oral Argument. Oral argument on this motion to compel defense discovery, if not granted outright, is requested.

9. Attachments. PO 104.

[redacted]
Prosecutor

Hodges, Keith

From: [redacted]
Sent: Friday, March 10, 2006 10:40 AM
To: [redacted]
Cc: [redacted] Fleener, Tom, MAJ DoD GC
Subject: Withdrawal As Counsel Memo - US v. Al Bahlul

Attachments: MAJ Fleener W-D Memo.pdf

MAJ Fleener W-D Memo.pdf (19 K...

Good Morning Mr. Harvey,

Attached to this email is MAJ Fleener's Request For Relief As Military Counsel Memo dated 6 Jan 05. Please do not hesitate to let me know if you need me to do anything else regarding this matter. Thank you for your time and have a wonderful day!

Very Respectfully,

[redacted]
Staff Sergeant, US Army
Military Paralegal NCO, Office of the Chief Defense Counsel DOD Office of the General Counsel Office of the Military Commissions
Telephone: [redacted]
Fax: [redacted]
Email: [redacted]

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

6 January 2005

MEMORANDUM FOR CHIEF DEFENSE COUNSEL

SUBJECT: Request to be Relieved of Duties Regarding – US v. al Bahul

1. On 3 November 2005, you detailed me to represent Mr. al Bahul in proceedings before a military commission. Mr. al Bahul does not desire my services, rather he wishes to represent himself.

2. Consequently, pursuant to the authority granted to you, I respectfully request you relieve me of my duties regarding Mr. al Bahul's case.

3. Thank you for your consideration.

TOM FLEENER
MAJ, JA, USAR
Defense Counsel

UNITED STATES OF AMERICA	**P - ____ al Bahlul**
v.	Defense Response to Prosecution Motion to Compel Defense Discovery
ALI HAMZA SULAYMAN AL BAHLUL	**18 March 2006**

1. Timeliness. This response is being filed within the time guidelines of POM 4-3, 20 Sep 05.

2. Facts. The Presiding Officer issued Discovery Order (PO 104) on 23 January 2006, which required the defense to provide the prosecution no later than 6 March 2006, of:

a. Evidence and copies of all matters the defense intends to offer at trial.

b. The names and contact information of all witnesses the defense intends to call at trial along with a synopsis of the witness' testimony.

c. As to any expert witness or any expert opinion the defense intends to call or offer at trial, a *curriculum vitae* of the witness, copies of reports or examinations prepared or relied upon by the expert relevant to the subject matter to which the witness will testify or offer an opinion, and a synopsis of the opinion that the witness is expected to give.

d. Prior statements of witnesses the defense intends to call at trial, in the possession or control of the defense counsel, or known by the defense counsel to exist, and relevant to the issues about which the witness is to testify that were:

(1.) Sworn to, written or signed by, the witness.

(2.) Adopted by the witness, provided that the statement the witness adopted was reduced to writing and shown to the witness who then expressly adopted it.

(3.) Made by the witness, and no matter the form of the statement, contradicts the expected testimony of that witness.

e. Notice to the Prosecution of any intent to raise an affirmative defense to any charge. An affirmative defense is any defense which provides a defense without negating an essential element of the crime charge including, but not limited to, lack of mental responsibility, diminished capacity, partial lack of mental responsibility, accident, duress, mistake of fact, abandonment or withdrawal with respect to an attempt or conspiracy, entrapment, accident, obedience to orders, and self-defense. Inclusion of a defense above is not an indication that such a

defense is recognizable in a Military Commission, and if it is, that it is an affirmative defense to any offense or any element of any offense.

f. In the case of the defense of alibi, the defense shall disclose the place or places at which the defense claims the accused to have been at the time of the alleged offense.

g. Notice to the prosecution of the intent to raise or question whether the accused is competent to stand trial.

3. Defense has complied with PO 104. Currently, the Defense has nothing discoverable. However, Defense understands that the Discovery Order is a continuing Order and will provide required discovery.

TOM FLEENER
MAJ, JA
Detailed Defense Counsel

Hodges, Keith

From: Hodges, Keith [redacted]
Sent: Monday, March 20, 2006 4:51 PM
To: [redacted]
Cc: [redacted]
Subject: FW: Request for Continuance - US v. Al Bahlul - 20 March 2006
Attachments: Trial Terms of the Military Commission at Guantanamo Naval Base (23 Feb 06).pdf; Defense request for continuance and prosecution replies (20 March 06).pdf

Your attention is invited to the below email and the attachments.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

From: Pete Brownback[redacted]
Sent: Monday, March 20, 2006 4:30 PM
To: keith - 1 - work
Subject: Request for Continuance - US v. Al Bahlul - 20 March 2006

Mr. Hodges,

Please forward this to all counsel in US v. Al Bahlul and to other interested parties. Please insure that the Chief Defense Counsel and the Chief Prosecutor are on distribution.

COL Brownback

All Counsel, US v. Al Bahlul,

1. I have received and reviewed MAJ Fleener's request for continuance for the 3 April 2006 trial term and the Prosecution comments thereon. The Assistant has made those emails a PDF document (attached).

2. It is not the Presiding Officer's job to determine how counsel are to arrange their schedule, keep track of deadlines, and otherwise fulfill their duties. Their duties include arranging personal business so that it will not conflict with being a detailed counsel -whether defense or prosecution.

3. It was ill-advised for MAJ Fleener to make personal leave arrangements which would conflict with

him traveling on the OMC flight to attend a term of the Commission without first coordinating with the Presiding Officer. The announced trial term of 3 April 2006 was made known to all counsel and other interested parties, including MAJ Fleener, in February. While the al Bahlul case was not expressly set for the week of 3 April at that time, the trial term calendar stated "Some of these trial terms already have business docketed. Future trial orders and docketing decisions will be announced to associate specific cases and business with specific trial terms and dates." (See attached.) To one concerned with properly performing duties, the trial term calendar should have been a signal to check with the Presiding Officer *before* making oneself unavailable for a scheduled trial term of the Commission.

4. Before sending his email on 20 March asking for a continuance, MAJ Fleener should have made some effort to determine whether there were alternate methods he could use to get to Guantanamo and still take his leave. There are a number of government flights which go from CONUS to Guantanamo Bay. That other flights are available is well known to all prosecutors and defense counsel in OMC. Indeed, the Presiding Officer traveled on an FBI flight with MAJ Fleener in November 2005.

5. While the Chief Defense Counsel may authorize leave for defense counsel, the Chief Defense Counsel may not excuse MAJ Fleener, or any other defense counsel, from attending a session of the Commission (anymore than the Chief Prosecutor can excuse prosecutors). The corrective action on this point will be handled through communications with that Office.

6. At my request, the Assistant has coordinated with CW2 [redacted] o attempt get MAJ Fleener on the 4 April 2006 FBI flight from Ft. Lauderdale to Guantanamo.

7. I will give CW2 [redacted] some time to determine whether there is a way the necessary arrangements can be made. That CW2 [redacted] is working the issue does not mean that MAJ Fleener, and those assisting him in the defense office, can not and should not also determine whether and what other arrangements are possible. If, after being given a reasonable opportunity to make this arrangement, CW2 [redacted] is unable to do so, I will rule on MAJ Fleener's request.

8. Until and unless I grant MAJ Fleener's request for a continuance, MAJ Fleener remains scheduled to attend a session of the Commission during the 3 April trial term.

Peter E. Brownback III
COL, JA, USA
Presiding Officer

Hodges, Keith

From: [redacted]
Sent: Monday, March 20, 2006 1:08 PM
To: 'Hodges, Keith'; [redacted]
Subject: RE: Defense Request for a continuance

Colonel Brownback -

The prosecution objects to the defense "special request for relief" to again delay proceedings in this case. Our objection is based upon the following:

1. On 23 February 2006 the APO notified all military commission counsel and participants of commission trial terms scheduled through July 2006. The term for the week of 3 April was listed in the notification.

2. On 10 March 2006, at approximately 0914, the prosecution electronically filed a motion to compel discovery.

3. On 10 March 2006, at approximately 1525, defense counsel filed a request for extension of time to respond to the prosecution's motion. Among other reasons for the requested extension until 31 March 2006, defense counsel said he was on leave the week of 13 March 2006. The request makes no mention of other periods of unavailability.

4. On 10 March 2006, between approximately 1530 and 1638, there is an exchange of emails between defense counsel and the chief clerk with copies sent to the APO, the chief defense counsel, and members of the prosecution.
Defense counsel raised several questions in his email sent at approximately 1638 and presumably expected answers.

5. On 10 March 2006, at approximately 1721, the APO replied to defense counsel, with copies to others, answering some of the questions raised in the email defense counsel sent less than 45 minutes earlier. The APO advised: "Within the next hour, you will receive an answer from the Presiding Officer for the extensions of time. Stay by your computer."

6. On 10 March 2006, at approximately 1752, the APO sent the following response on behalf of the PO:

"MAJ Fleener,

1. Each time that you have been tasked to accomplish something, you have been given a date by which the task must be accomplished.
Neither the Presiding Officer nor the Assistant to the Presiding Officers is responsible for keeping your work calendar in order. This email does not serve to state that the below information captures all of your due dates. You are responsible for your own due dates.

2. You are making certain choices concerning your duty and your desires.
You will note that you are already past due on certain discovery matters, you delivered the request to withdraw memorandum late, and you have not yet, to my recollection, completed a task on time. Consequently, I am not

inclined to grant any delay to you other than that noted below.

3. The matters which you mention in paragraphs 7a-e are matters which could have been foreseen. To the extent to which they could not have been foreseen, it seems they could have been resolved by working past "normal"
duty hours, using the telephone, or other measures.

4. If you wish to review your materials, determine the matters in which you are delinquent, prioritize your efforts and your time available, and then request a delay on a specific matter noting the due date, a specific date you can complete the matter, and reasons why the delay is necessary, you may do so. It appears that your global request for a general extension to everything is unwarranted.

5. As to the requests contained in your email below:

a. Your paragraph 1. The Defense does need to respond to the Motion to Compel Discovery filed this week. I grant you an extension until 24 March to do so. If you have a Discovery Request to make, make it not later than 31 March.

b. Your paragraph 2. If you wish to brief the self-representation issue, do so not later than 31 March.

c. Your paragraph 3. As I stated on the record on 1 March 2006, you have until 22 March 2006 to supplement your request that I
grant your challenge for cause. You may raise whatever matters you so
desire with the Appointing Authority; however, I do not see any reason that your dealings with the Appointing Authority should cause a delay in the Commission proceedings.

d. Your paragraph 4. I grant you an extension until 23 March to fulfill your responsibilities with respect to the draft session transcript that was served on you.

e. Your paragraph 5. You are advised to go through your emails and other materials and make a list of what is due when. If you wish assistance from the Assistant, make a request directly to him setting forth the specific reasons why you do not know what matters are due when.

f. Your paragraph 6. Your request is granted in part and denied in part as indicated by paragraphs 5-a-e above.

6. Reference your paragraph 7(e). Advise not later than 23 March all the measures you have taken to obtain another counsel in this case.
Ensure you include copies of any requests that you have provided the Chief Defense Counsel for such assistance, since he is the one responsible for detailing defense counsel.

7. You will also be prepared to come to Guantanamo for a session to be held during the trial term beginning on 3 April 2006. At this session, I will be able to measure, on the record, your progress or lack thereof in the matters which you have before you. I will also be able to learn from you and the Chief Defense Counsel the progress being made in getting an assistant counsel on the case.

Peter E. Brownback III
COL, JA, USA
Presiding Officer"

7. On Saturday, 18 March 2006, defense counsel filed a response to our motion to compel discovery. The response states the defense has no discoverable information to provide the prosecution. This is despite defense

counsel's claims on the record and to the news media that the defense has evidence to present at trial.

8. On 20 March 2006, for the first time, defense counsel states that he purchased airline tickets for the period 1-3 April 2006 and he made the purchase on 10 March 2006, the same date as the email exchanges noted above. Because of his air travel plans, defense counsel requests to delay the proceedings again, this time for 3 weeks, to accommodate his personal plans.

9. The government has already made and continues to make logistical arrangements necessary for participants to attend the 3 April 2006 trial term in Cuba.

10. Defense counsel had ample notice of the 3 April 2006 trial term and was directed by the PO on 10 March 2006 to attend that session.

11. The prosecution believes it is important to resolve, on the record, the motion to compel discovery. The prosecution has no objection to moving the hearing to later in the week during the 3 April 2006 trial term.

V/R

[redacted]USAFR
Prosecutor

-----Original Message-----
From: Hodges, Keith[redacted]
Sent: Monday, March 20, 2006 11:23
To:[redacted]
Subject: RE: Defense Request for a continuance

LtCol.[redacted]

The defense request for continuance is being treated, at this point, as a special request for relief, and as such has been filed in accordance with POM 4-3. If the Prosecution wishes to be heard, now is the time.

BY DIRECTION OF THE PRESIDING OFFICER

Keith Hodges
Assistant to the Presiding Officers
Military Commission
[redacted]

-----Original Message-----

From: [redacted]
Sent: Monday, March 20, 2006 11:11 AM
To: Fleener, Tom, MAJ DoD GC; 'Hodges, Keith'; Davis, Morris, COL, DoD OGC; [redacted]
Subject: RE: Defense Request for a continuance

Colonel Brownback -

The Government objects and will continue to object to the Defense request for continuance once it is submitted in accordance with POM 4-3. The issues scheduled for the planned session require timely attention on the record by the Commission.

v/r

[redacted]USAFR
Prosecutor

-----Original Message-----
From: Fleener, Tom, MAJ DoD GC
Sent: Monday, March 20, 2006 10:52
To: 'Hodges, Keith'; Fleener, Tom, MAJ DoD GC; Davis, Morris, COL, DoD OGC; [redacted]
Subject: Defense Request for a continuance

Colonel Brownback,

Defense requests a continuance from the early April docket to the late April docket. Reasons for the request are as follows:

1. On 10 March, I purchased plane tickets to California from 1 Apr - 3 Apr. I selected that weekend based on the Apr docket that existed at that time. I had to purchase the ticket greater than 21 days in advance, leaving very little time for consultation with authorities.

2. Prior to purchasing the ticket I received consent to go from Colonel Sullivan.

3. The purpose of the trip is a mixture of business and pleasure. Because I have been away from DC so much this year, I was forced to leave my dog with my parents. They have had my dog since Christmas and are getting ready to fly away on April 10. Consequently, I have to pick him up before they leave. I consider this business related as the only reason Hank is in

California is because of my work schedule. Also during the trip, I will be seeing a German family that I spent time with while stationed in Europe. They will be staying at my parents house that weekend. I have not seen them since leaving Germany in 2002.

4. I have finished errata and will have briefed self-representation and supported my challenge for recusal of the PO in the next 10 days or so. I am acting diligent.

Respectfully request a continuance.

Major Tom Fleener

Trial Terms of the Military Commission
Guantanamo Naval Base, Cuba

23 February 2006

Setting trial terms and a docket requires full consideration of many factors, to include: the needs of the accused, counsel, and other participants; logistics; and long-range planning requirements. To best accommodate these needs, and so as to provide full and fair trials, the Presiding Officers have established the below trial terms. Some of these trial terms already have business docketed. Future trial orders and docketing decisions will be announced to associate specific cases and business with specific trial terms and dates. Other trial terms may be added as necessary.

Trial terms already announced

27 February – 3 March 2006: This trial term will be held as scheduled. A docket has been published.

27 March – 31 March: This trial term has been cancelled to meet the needs of participants.

Additional Trial Terms

3 April – 6 April 2006: Sessions in *US v. Khadr* and *US v. Muhammad* have already been docketed for this trial term.

24 April – 28 April 2006

15 May – 19 May 2006

5 June – 9 June 2006: A session in *US v. Khadr* has already been docketed for this trial term.

10 July – 14 July 2006

/s/
Keith Hodges
Assistant to the Presiding Officers

UNITED STATES OF AMERICA v. ALI HAMZA SULAYMAN AL BAHLUL	**Defense Motion Challenging the Presiding Officer** **24 March 2006**

1. Timeliness. This response is being filed within the time guidelines of POM 4-3, 20 Sep 05.

2. Relief Sought. Defense requests the Presiding Officer apply a standard similar to the one outlined in R.C.M. 902 regarding challenging a Military Judge. After applying such standard, Presiding Officer should grant Defense motion to disqualify. Regardless of whether the motion to disqualify is granted or denied, the Presiding Officer should then certify this issue and forward it to the Appointing Authority under the provisions of MCI No. 8, para. 4.

3. Burden of Proof. Defense as the moving party has the burden to show by a preponderance of the evidence that the Presiding Officer should recuse himself. An implied bias test should be used to examine the facts outlining the requested recusal.

4. Facts. After undersigned counsel conducted *voir dire* and challenged the Presiding Officer for cause, counsel was allowed to brief the Presiding Officer on the proper standard to be used and to supplement the requested challenge.

a. On 19 October 2004, the Appointing Authority issued a decision regarding the standard that should be applied to challenge commission members for cause. See RE 158. The standard adopted by the Appointing Authority included a "limited implied bias component."

b. On 31 August 2005, the Secretary of Defense reissued Military Commission Order No. 1. The new MCO significantly changed the structure of the military commissions in that it gave the Presiding Officer duties consistent with those of a military judge, rather than those more closely akin to a juror.

c. On 1 March 2006, undersigned counsel conducted *voir dire* and challenged the Presiding Officer for cause. In denying Defense motion to challenge, the Presiding Officer noted the significant changes to the MCO #1 and recognized that the standard outlined by the Appointing Authority in 2004 might be in question. The Presiding Officer then stated that in denying the motion to challenge he applied both the 2004 standard and a "modified implied bias standard" based in large part on R.C.M. 902.

d. Counsel was then allowed to brief the Presiding Officer on the proper standard

to be used and to supplement the requested challenge.

5. Law and Argument.

Judges, like Caesar's wife, should always be above suspicion

A. The Standard to Challenge a Presiding Officer for Cause should be Similar to the One Outlined in RCM 902.

Under MCO No. 1 of 2002, the Presiding Officer served essentially as one of the commission members. While he "presided" over the sessions, he did not make rulings of law. Rather he voted along with the other members regarding guilt and sentencing.

Accordingly, when the Appointing Authority issued its decision in 2004 regarding the standard to apply in challenges for cause, it did not differentiate between the Presiding Officer and other commission members. The standard the Appointing Authority applied to challenges was:

> Based on the totality of the factual circumstances, a challenge for cause will be sustained if the member has an interest in the outcome of the case, may be biased for or against one of the parties, is not qualified by commission law to serve on the commission, or may be unable or unwilling to hear the case fairly and impartially considering only evidence and arguments presented in the accused's trial.

RE 153 (al Bahlul) page 10 of 28.

In August of 2005, the Secretary of Defense significantly altered the entire trial scheme of military commissions. Instead of having all the members sitting as both triers of law and fact he made the commission members much more like a civilian jury or court-martial panel. He defined the role of Presiding Officer in a way much more akin to that of a civilian judge or a military judge. Consequently, the commission members will decide issues of fact and the Presiding Officer will decide issues of law.

The Department of Defense made the changes to the structure of the commissions as a direct result of examining the earlier (2004) proceedings. A DoD press release indicated that "the principal effect of these changes is to make the presiding officer function more like a judge and the other panel members function more like a jury." Current Commission practice emphasizes the judge-like role of the Presiding Officer through distinctions in courtroom architecture and dress.

As the structure of the commissions has changed to adopt a more traditional role of a judge/jury system, so must the standard for challenging various members adapt. Consequently, the standard to be applied to challenging the Presiding Officer for cause

should be similar to the standard used for challenging a military judge or a civilian judge.

R.C.M. 902(a) states ". . . a military judge shall disqualify himself in any proceeding in which that military judge's impartiality might reasonably be questioned." This provision governs the appearance of bias. U.S. v. Butcher, 56 M.J. 87, 90 (CAAF 2001). R.C.M. 902(a) quotes from 28 U.S.C. § 455(a), which essentially provides the identical standard to federal judges.

28 U.S.C. § 455(a) was enacted to maintain public confidence in the judicial system by avoiding "even the appearance of partiality." Id citing Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860, 108 S. Ct. 2194, 100 L. Ed. 2d. 855 (1988).

One can hardly imagine a situation where the public confidence is more important than the current military commissions. The system (and the detention of the detainees at Guantanamo Bay) has come under unprecedented scrutiny. Consequently, it is of dire urgency that the military commissions system *appears* fair.

The standard previously issued by the Appointing Authority must be amended to reflect the different role the Presiding Officer now serves. There is no reason not to apply the standard applicable to every other judicial officer, especially in light of the prosecution's and the administration's insistence that the "new" commission structure is more "trial-like".

The Presiding Officer should adopt the standard set forth in R.C.M. 902 when considering challenges to his own ability to serve. Most importantly, the Presiding Officer must certify this issue and request the Appointing Authority reconsider his position from 2004 in light of the significant changes to the MCO No. 1.

B. The Presiding Officer Should Grant the Challenge for Cause Recusing Himself From Further Participation in These Proceedings.

Given his revised role under MCO No. 1, the Presiding Officer must be held to the standards applicable to judicial officers generally. These standards are demanding and must be rigorously applied in light of the extreme public scrutiny of the military commission system.

> An independent and honorable judiciary is
> indispensable to justice in our society.

ABA Model Code of Judicial Conduct Canon 1.

> The integrity and independence of judges depends
> in turn upon their acting without fear or favor. . . .

> Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Commentary to ABA Model Code of Judicial Conduct Canon 1

The Presiding Officer must disqualify himself in this case. He is neither independent nor competent to serve in this capacity. Further, his actions and relationship with the Appointing Authority cause any reasonable person to doubt his ability to provide for a full and fair trial. The clearest example of this is to examine the following facts through the lens of public perception:

> Thirty-four lawyers volunteer to serve as Presiding Officer. Of the 34, all but one of them (COL B) is currently either practicing law or serving as a judge. Not only was COL B not practicing law, but he had never been an active member of any Bar. He had never been subject to a licensing authority that required continuing legal education or mandatory ethics training. While he had "practiced law" in the military for many years, including nearly a decade as a military judge, it appears that some of that time he may have been engaged in the unauthorized practice of law because he was not an active Bar member. After retiring from the military, COL B did not perform any legal duties. Rather, during the last five years, he has worked as a census taker and a safety officer on a beach, as well as taught classes occasionally at a local community college.
>
> Of the 34 applicants, one has a close personal friendship with Mr. A. COL B has been friends with the Mr. A for many years. COL B's wife used to work for Mr. A. COL B had dinner several times with Mr. A over the years. COL B and Mr. A "roasted" each other at their respective retirements. After retiring, COL B and Mr. A continued their friendship. They spoke several times over the phone and exchanged numerous emails. COL B attended the wedding of the Mr. A's son.
>
> Sometime after the wedding, Mr. A is chosen to be the Appointing Authority in charge of supervising

the prosecution of alleged terrorist suspects. Immediately after being chosen he receives an email from his friend COL B congratulating him on the selection. One of Mr. A's duties is to choose the Presiding Officer from the 34 names mentioned above.

The next month, COL B receives a phone call asking him if he was still interested in the job. A few weeks pass and COL B and Mr. A exchange emails and COL B even calls Mr. A at home. During the phone call, COL B and Mr. A discuss the difficulties in setting up the Appointing Authority's office. COL B makes a suggestion regarding hiring.

After a few more weeks, COL B receives good news - his friend, Mr. A has chosen him from the 34 others to serve as a judge.

Would a reasonable person believe that COL B's selection was because of his qualifications or is it reasonable to believe that it was because he was friends with the Appointing Authority?

1) The Presiding Officer must recuse himself because he is not competent to serve.

While the Presiding Officer might meet the statutory prerequisites to serve, that does not make him competent. Competence, in this case, does not mean "qualified." Competence means suitability and proficiency.

Ironically, one example of the Presiding Officer's lack of proficiency was his ruling regarding Mr. al Bahlul's request to proceed *pro se*. In that ruling, he found Mr. al Bahlul "not competent" to represent himself. The standard the Presiding Officer applied focused on factors that would speak to the abilities of Mr. al Bahlul to conduct his own defense. Namely the Presiding Officer's Conclusions of Law mentioned Mr. al Bahlul not having the necessary background, training, and language skills as bases for denying him the right of self-representation.

The Supreme Court had, 10 years earlier, outlined the proper test for whether a defendant can waive his right to counsel (and its corollary of proceeding *pro se*). In Godinez v. Moran, the Court stated that "the competence that is required to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself." Godinez v. Moran, 509 U.S. 389, 399, 113 S. Ct. 2680, 2687, 125 L. Ed. 2d 321, 332 (1993) The Court than referred to Faretta v. California, and stated:

> In [Faretta] we held that a defendant choosing self-representation must do so "competently and intelligently" but we made clear that the defendant's technical legal knowledge is not relevant to the determination whether he is competent to waive his right to counsel . . . a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation.

Id, at 389 citing Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d. 562, 95 S. Ct. 2525 (1975).

The Presiding Officer failed to apply the correct legal standard. Rather, the standard he applied has been expressly denounced for over 10 years.

The fact that the Presiding Officer has only maintained an Associate membership in the Virginia Bar is extremely troubling. While it is unclear why the Presiding Officer chose to never be an active member of any Bar, the results are important. Because of his Associate membership, he never had any Continuing Legal Education requirements. This is of vital importance in this case because nearly every issue litigated is novel and complex. It is not asking too much to give Mr. al Bahlul the benefit of having a learned jurist preside over his case.

Most troubling though is that while maintaining his status as an Associate member of the Virginia Bar, the Presiding Officer was *practicing* law. RE 165 is an opinion from the Virginia State Bar which would seem to indicate that the Presiding Officer's practice of law while in the military was unauthorized. The Presiding Officer admitted during *voir dire* that while serving as an operations officer with the Army Trial Defense Service he was practicing law while living in Virginia. This practice appears to be unauthorized. While serving as a military judge may not be considered the practice of law, most or all of the Presiding Officer's other legal duties were.

Contrary to the requirement that all Army JAG officers receive three hours of legal ethics training annually, the Presiding Officer stated in *voir dire* that he had not had the ethics training as required. As legal ethics are taking center stage in this proceeding, it is imperative that the Presiding Officer understand legal ethics. From his answers both in written and oral *voir dire*, it would appear that since 1999 *at most* he received two hours of ethics training and that is only if he attended the optional ethics session offered during the Law of War Course in 2005.

Not only was the Presiding Officer not engaged in the practice of law from 1999-2004, but his non-legal employment was singularly unrelated to the qualifications of a presiding officer. He worked as a safety person and a census taker. While there is nothing wrong with a person retiring, it is unfathomable to think that an individual who has been retired from the legal profession for 5 years should be selected to serve as the Presiding Officer of this commission.

There were 34 people the Appointing Authority could have chosen to serve as Presiding Officer. See Attachment a. Of the 34, all but one was either serving as a military judge, a civilian judge, or engaged in the active practice of law. The only nominee not engaged in any legal duties was selected as the presiding officer.

2) The Presiding Officer must recuse himself because of the appearance of bias.

Where no actual bias or prejudice is shown, the issue of disqualification under RCM 902(a) is considered under an objective standard: Any conduct that would lead a reasonable person knowing all the circumstances to the conclusion that the judge's impartiality might reasonably be questioned is a basis for disqualification. U.S. v. Norfleet, 53 M.J. 262 (CAAF 2000). Note, this reasonable person is *not* an individual skilled or familiar with the law. Rather he is an objective, reasonable person. U.S. v. Sherrod, 22 M.J. 917 (ACMR 1986).

"Since the military rule on disqualification of judges closely parallels the federal rule, federal decisions in this area can offer guidance. ... The question to be asked is: Would a hypothetical onlooker be troubled by what happened?" U.S. v. Berman, 28 MJ 615, 617-18 (AFCMR 1989) citing U.S. v. Murphy, 768 F.2d 1518 (7th Cir. 1985).

Clearly here, a hypothetical onlooker would be troubled by the Presiding Officer's service on this military commission. The onlooker would be concerned by the closeness of the relationship between the Appointing Authority and the Presiding Officer.

The fact that the Appointing Authority and the Presiding Officer have been friends for several years would concern the onlooker. The fact that the Presiding Officer and the Appointing Authority "roasted" each other at their respective retirements would be of concern.

The hypothetical observer would be troubled by the Presiding Officer's refusal to answer questions in written *voir dire*. (See RE 156). The observer would question why first the Presiding Officer stated in writing that what his parents did professionally was not relevant, (see RE 156, question 1), repeated the assertion on page 202 of the *voir dire* transcript, and then ultimately disclosed that his father was a retired State Department official who spent significant time in the Middle East apparently working on implementing the Camp David Accords. The Accords, of course, have served as one of the defining issues in Middle East politics involving Arab States and Israel. In a military commission where the United States support of Israel was one factor that led to al Qaeda's creation, a reasonable observer would wonder why the Presiding Officer did not think his father's work to be relevant.

Likewise the hypothetical observer would be concerned that the Presiding Officer

refused in writing to answer in writing or orally in which state he lives. Is it because the Presiding Officer is concerned that he will be targeted by al Qaeda? If so, he should have disclosed that concern. Is it because the Presiding Officer is concerned that the legal actions he takes in this case might possible subject him to discipline by a State Bar? See 28 U.S.C. § 530B(a). If so, he should have disclosed those concerns. Regardless of the possible motivations, the observer would conclude that the Presiding Officer was not being forthright and would wonder why.

Another issue that would trouble the hypothetical observer is the fact that the Presiding Officer apparently is either assigned or detailed to the Office of Military Commissions, but apparently does not report to anyone. When asked who signs his leave forms, the Presiding Officer refused to answer. Knowing who signs the Presiding Officer's leave form might reveal to whom he is reporting. Could it be that the Presiding Officer is concerned with U.C.M.J. art 26(c) which provides that no convening authority and no member of the convening authority's staff may prepare or review any report concerning the effectiveness, fitness or efficiency of the military judge... which relates to his performance of duty? This provision would prove troubling if in fact the Appointing Authority (or someone in his office) supervised the Presiding Officer. Unfortunately, the Presiding Officer refused to provide details regarding his supervisory chain.

Also bothersome to the observer would be that prosecutors have stated that the military panel will be handpicked and will not acquit these detainees. As the Presiding Officer was the first member selected for the service on the "military panel," and as the emails were generated around the same time the Presiding Officer was chosen, it would not be too much of a stretch to conclude that the Presiding Officer was handpicked to convict.

Finally, it must be pointed out that the Presiding Officer's recall to Active Duty has given him a substantial financial windfall. Rather than drawing his military retirement, supplemented by odd jobs, he now draws full salary and BAH at the O6 level. This is presumably a rather sizeable amount of money. The Supreme Court addressed the issue of the appearance of impropriety when it found that individuals serving in quasi-judicial roles may not be compensated based on the interest in the controversy. See Tumey v. Ohio, 273 U.S. 510, 47 S. Ct. 437, 71 L. Ed. 749, (1927).

The appearance of bias permeates the Presiding Officer's relationship with the Appointing Authority. There is literally no way an outside observer could examine the facts and circumstances surrounding the Presiding Officer's relationship with the Appointing Authority and not come to the conclusion that justice will be better served if the Presiding Officer disqualifies himself. Even the Prosecution in these commissions recognized this fact when it essentially agreed with the Defense in the case of US v. Hicks that the Presiding Officer should "closely evaluate" his impartiality and consider resigning.

3) The Presiding Officer must recuse himself because he is not independent.

Everyone agrees that the Presiding Officer must be independent. Unfortunately, the last adjective one would use when describing this Presiding Officer is "independent." His relationship, both personal and professional, gives him the appearance of being simply an arm of the Appointing Authority. To clearly see this point, all one needs to ask is if the Presiding Officer were a military judge and the Appointing Authority were a convening authority, would their relationship pass muster?

Nowhere is their interdependency more transparent than when examining the email traffic that flows from the Appointing Authority's office to the Presiding Officer's office. There is too much information to attach here and most is available in various REs, but one thing is clear: the Presiding Officer has assisted the Appointing Authority in shaping the rules of the commission system. While the Presiding Officer can state that he is not responsible for what emails he receives, the fact is that he is. An individual serving in a quasi-judicial capacity has an obligation to appear unbiased and independent. Just as a military judge would not include the convening authority on substantive emails, neither should the Presiding Officer include the Appointing Authority on substantive emails.

Throughout RE 153 the Appointing Authority speaks to the relationship between himself and the Presiding Officer and analogizes it with military law involving a convening authority and a court-martial member. While not granting a challenge against the Presiding Officer in 2004 was colorable, it must be granted now. The main distinction between the Presiding Officer in 2004 and the Presiding Officer now is that he is a *judicial* officer. He is not simply a panel member who might have some sort of relationship with a convening authority that might be appropriate under the circumstances. The Presiding Officer is now a judge. It is wholly inappropriate for someone to serve in a judicial capacity, yet be intimately involved both personally and professionally with an individual whose job is to oversee the prosecution of cases.

Unlawful Command Influence is one of the UCMJ articles specifically applicable to military commissions. See Art 37, UCMJ. This military commission as composed is the equivalent of a General Court-Martial Convening Authority *handpicking* the military judge. The GCMCA then drafts the charges, *drafts the law*, and asks his handpicked military judge to apply it.

ABA Judicial Canon 3 addresses *ex parte* communications by judges. The Canon essentially prohibits judges from engaging in the kind of *ex parte* communications with the Appointing Authority's office except in limited circumstances. Further, the Commentary to the Canon instructs the judge not to use law clerks or other personnel to engage in these communications. While the Canon allows for judges to consult with law clerks regarding substantive issues and to have limited communications with court personnel that are purely administrative in nature, these communications are the

exception rather than the rule. There is little doubt that the communications that flow back and forth between the Appointing Authority's office and the Presiding Officer go way beyond what the drafters would believe is permissible. Also, the commentary makes clear that it is impermissible for a judge to use a clerk or other personnel to engage in *ex parte* communications.

The Canon also prohibits the kind of *ex parte* discussions the Presiding Officer had with members of the Judge Advocate General's School faculty. During *voir dire* the Presiding Officer stated that he "sought opinion, advice, and guidance from fellow Presiding Officers from the Assistant to the Presiding Officer and, as I said, from people at the JAG School when I was there." Pg 238 voir dire transcripts. He then stated that one individual he sat down with was Major Watts.

The Presiding Officer attended the Law of War Course in 2005, while Mr. al Bahlul's charges were pending. Canon 3(B)(7)(b) allows a judge to "obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of this advice, and affords the parties the opportunity to respond." However, the Presiding Officer never gave notice to the parties. Had counsel not asked on *voir dire* no one would have known that he sought expert advice on a pending matter. Further, he would not relay the substance of the advice as required by the Canon. Moreover, Major Watts is a lawyer employed by one of the parties in this case - the United States. Clearly a judicial officer should never seek *ex parte* legal guidance from a lawyer employed by a party appearing before him. Yet that is exactly what the Presiding Officer did in this case.

6. Conclusion.

The government has bandied about the terms "commissions law" and "commissions jurisprudence" to describe the various Military Commission orders, instructions, and regulations, memoranda, and decisions that have been promulgated in the course of commission proceedings. A critical theme that will pervade litigation before the commission is the extent to which "commission law" is plenary, or whether it is subject to a higher set of "fundamental norms," e.g., the Constitution, the UCMJ, or international law, which govern and may limit the President's and/or the DoD's power to structure military commissions. Accordingly, the lawyer presiding over the first military commission in sixty years must be someone with sufficient courage, wherewithal, and professional knowledge that his rulings on these fundamental matters will be afforded respect and legitimacy. The Presiding Officer's relationship with, and apparent indebtedness to the Appointing Authority, coupled with his lack of experience in matters of international or constitutional law, foster the likelihood that any decision he makes affirming the basic legitimacy of the commissions process will not be viewed with respect and deference, but rather as a manifestation of loyalty to his longtime friend and patron.

Regardless of the test applied, the result is the same: the Presiding Officer must disqualify himself. With this Presiding Officer presiding over this commission, the world will know that although the President says that this trial will be full and fair, that could not be farther from the truth.

C. Regardless of the Presiding Officer's Decision, this Matter Must be Certified and Addressed to the Appointing Authority.

MCI No. 8 gives the Presiding Officer the discretion, in this instance, to certify this issue as interlocutory to the Appointing Authority. Because of the nature of the issue, it is one that is more properly addressed by the Appointing Authority. This is even more apparent because of the argument of possible pecuniary gain by the Presiding Officer's continued service. Consequently, it is in the interest of justice that the Presiding Officer certify this question.

6. Additional Information: None

7. Oral Argument: Oral argument on this motion if not granted outright is requested.

8. Attachments:
   a. Nomination of Presiding Officer document. 2 pgs
   b. [redacted]emails. 12 pgs
   c. Model Code of Judicial Conduct Canon 1. 1 pg
   d. ABA Model Code of Judicial Conduct Canon 3. 8 pgs
   e. RE 138 (al Bahlul). 55 pgs
   f. RE 152 (al Bahlul). 9 pgs
   g. RE 153 (al Bahlul). 28 pgs
   h. RE 156 (al Bahlul). 18 pgs
   i. RE 165 (al Bahlul) Virginia Bar Unauthorized Practice of Law opinion. 2 pgs
   j. RE 166 (al Bahlul). 2 pgs
   k. RE 167 (al Bahlul). 9 pgs

TOM FLEENER
MAJ, JA, USAR
Detailed Defense Counsel

AL BAHLUL
REVIEW EXHIBIT 180
PAGES 12 AND 13

Review Exhibit (RE) 180, pages 12 and 13, is an Excel spreadsheet with 34 rows and twelve columns of information. One row is for each person nominated to be a Presiding Officer, and twelve columns are for each category pertaining to each row.

The information categories in the columns include: name, military rank, date of rank, gender, branch of service, duty position(s), security clearance, judicial experiences and litigation experiences.

There were twenty-seven O-6 (Colonel in Army, Air Force and Marines, or Captain in Navy) officers nominated and seven O-5 (Lieutenant Colonel in Army, Air Force and Marines, and Commander in Navy) officers nominated. None were of a lesser military rank.

Officers nominated were in the active or reserve component, or retired.

Mr. Altenburg's initials appear next to the name, Brownback, Peter E.

In this instance the right to personal privacy of the military personnel nominated to be Presiding Officers by their military services outweighs the public interest in this information.

RE 180, pages 12 and 13, was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 180.

//signed//

M. Harvey
Chief Clerk of Military Commissions

-----Original Message-----
From: Beach, Fred, COL, DoD OGC
Sent: Monday, March 15, 2004 11:29
[redacted]
Subject: Allegations of misconduct and unprofessionalism against Chief Prosecutor
Importance: High

All:

Please read below.

Capt. [redacted] has made some serious allegations against me as the Chief Prosecutor---charges that, if true, mandate that I be relieved of my duties.

Among other things, Capt. [redacted] insists that an "environment of dishonesty, secrecy, and deceit" exists within the entire office.

In an email preceding Capt. [redacted] you will note that Maj. [redacted] voices similar [redacted] is "disgusted" with the "lack of vision" a[redacted] the office, and has "utter contempt" for [redacted]cates serving with us.

Bottom line: Both Capt. [redacted] and Maj. [redacted] believe that what we are doing is so wrong that they cannot "morally, ethically, or professionally continue to be a part of this process."

I am convinced to the depth of my soul that all of us on the prosecution team are truly dedicated to the mission of the Office of Military Commissions---and that no one on the team has anything but the highest ethical principles. I am also convinced that what we are doing is critical to the Nation's on-going war on terrorism, that what we have done in the past---and will continue to do in the future---is truly the "right" thing, and that the allegations contained in these emails are monstrous lies.

It saddens me greatly that two judge advocates---whom I like very much and for whom I have only the greatest respect and admiration---think otherwise. In fairness to all of you, however, it is important that you read what has been written about me and you.

COL Borch

-----Original Message-----
From: [redacted]
Sent: Monday, March 15, 2004 07:56
To: Borch, Fred, COL, DoD OGC
Cc: [redacted]
Subject: RE: Meeting with Colonel Borch and

myself, 4:00 p.m. today, Col Borch's office

Sir,

I appreciated the opportunity to meet last Thursday night, as well as the frankness of the discussion. The topics covered and the comments made have been replaying in my mind since we ended the meeting. I have also reviewed Ma[redacted] comments in his e-mail below, and I agree with them in every respect.

I feel a responsibility to emphasize a few issues. I do not think that our current troubles in the office stem from a clash of personalities. It would be a simple, common, and easily remedied situation to correct if this were true. People could be reassigned or removed.

It is my opinion that our problems are much more fundamental. Our cases are not even close to being adequately investigated or prepared for trial. This has been openly admitted privately within the office. There are many reasons why we find ourselves in this unfortunate and uncomfortable position – the starkest being that we have had little to no leadership or direction for the last eight months. It appears that instead of pausing, conducting an honest appraisal of our current preparation, and formulating an adequate prosecution plan for the future, we have invested substantial time and effort to conceal our deficiencies and mislead not only each other, but also those outside our office either directly responsible for, or asked to endorse, our efforts. My fears are not insignificant that the inadequate preparation of the cases and misrepresentation related thereto may constitute dereliction of duty, false official statements, or other criminal conduct.

An environment of secrecy, deceit and dishonesty exists within our office. This environment appears to have been passively allowed to flourish, if it has not been actively encouraged. The examples are many, but a few include:

1. CDR [redacted] misrepresentations at the Mock Trial - CDR [redacted] made many misrepresentations at the Mock Trial, to include stating that [redacted] no reason to believe [redacted] suffered any mistre[redacted] or torture. When I cor[redacted]ly after the mock trial [redacted]'s notes to the contrary [redacted] was aware of abuse allegations re[redacted]ahlul. Interestingly, it was because of P[redacted]ents at the mock trial that we even began to inquir[redacted]the detention camps in AF, which prior to the mock trial had been consciously ignored. Other troubling aspects of the mock trial include, but are not limited to: statements that we would be ready for trial in 3 days, that al Bahlul has maintained from day one that he is a member of AQ, the deliberate and misleading presentation of select statements from al Bahlul, the careful coordination of the schedule to limit meaningful questions, the conscious inclusion of an overwhelming amount of paper in the notebooks, and the refusal to include a proof analysis.

2. Suppressing FBI Allegations of Abuse at Bagram - Over dinner and drinks, KK and Lt [redacted]t heard from FBI agents

[redacted] were being abused at the Bagra[redacted]
[redacted] after dinner that they couldn't re[redacted]
because it was told to them "in confidence," [redacted]
[redacted] and [redacted] anyway, and all three st[redacted]
credible evidence and concluded on their own[redacted]
not report the allegation to you or other member[redacted]
Interestingly, CDR [redacted] recently suggested the[redacted]
lack of experience and judgment, be sent to re[redacted] of
abuse at Bagram.

3. Refusal to give Mr. Haynes th[redacted] video -
Mr. Haynes asked CDR [redacted] copy of the CDLE video. I heard
CDR [redacted] ask CDR [redacted] whe[redacted] should take a copy of the video over
to Mr. Haynes. CDR [redacted] told [redacted] to, and that maybe in a few days
Mr. Haynes would forget that he asked for it.

4. The disappearance/destruction of evidence -
As I have detailed to you, my copy of CDR [redacted] notes detailing the 302
in which al Bahlul claims torture and abuse is now missing from my
notebook. The 302 can not be located. Additionally, [redacted] of the
FBI related last week that he called and spoke to CDR [redacted] about the
systematic destruction of statements of the detainees, and CDR [redacted] said
that this did not raise any issues.

5. [redacted] out this for a year."
[redacted] on the UN 1267 list, and was only learned of it in
[redacted] confronted with t[redacted] he claimed t[redacted]
[redacted] the last year. N[redacted] been made pr[redacted]
Doc to discov[redacted] at evidence [redacted] ded to the list, and we
still don't kno[redacted] s aware of [redacted] left to wonder
why so inquir[redacted] s with the S[redacted]nt. He made the same
"I've known a[redacted] for a year" claim about the Tiger Team AQ 101
brief, althoug[redacted] had many of us searching for the information
contained wi[redacted] months.

6. CDR [redacted] misrepresentations at the off[redacted]
overview of his case. As detailed in a previo[redacted] to you, CDR [redacted]
made numerous misrepresentations concer[redacted]s at the office
meeting to discuss his case, indicating that [redacted] consciously lied
to the office, or does not know the facts of [redacted] after 18 months of
working on it.

I have discussed each of these specific examples
with you, and you told me that you had taken corrective action to some.
For example, in reference to paragraph 2, I asked how I was suppose to
trust these attorneys to review documents and highlight exculpatory
evidence and you responded that "when the time comes" you would put out
very direct guidance. I do not believe that ethical behavior is
something that can be directed during selective time periods.

These examples are well known to the members of
this office, yet there has been no public rebuke of the behaviors.
Hence, the environment and behaviors continue to flourish. I am left to
wonder why at an office meeting we were not told:

"I understand that misrepresentations are being

made concerning the facts of our cases. If I find out this happens again, the responsible party is going to be fired."

"I understand that evidence is being withheld from our civilian leadership.. If I find out this happens again, someone is going to be fired."

"I understand that allegations of abuse are not being brought to my attention or reported to the appropriate authorities. If I find out this happens again, someone is going to be fired."

"I understand that evidence is being hidden or destroyed. If I find out this happens again, someone is going to be fired."

Even in regards to CDR [redacted] recent behavior towards [redacted] and myself, the office was not told the real reason for wh[redacted] been removed as the deputy, only further feeding the undert[redacted]mosity and indicating that the action was forced upon you and not [redacted] justified - if not, surely you would have taken a less conciliatory stance.

You stated in our meeting last week that what else can you do but lead by example.

In regard to this environment of secrecy, deceit and dishonesty, the attorneys in this office appear to merely be following the example that you have set.

A few examples include:

You continue to make statements to the office that you admit in private are not true. With many of the issues listed here, the modus operandi appears to be for you to make a statement at a meeting, pause, and when no one states a disagreement, assume that everyone is in agreement. To the listener, it is clear that the statements are not true, but we are not to correct, disagree, or question you in front of the office. (For example, when I asked you basic questions concerning conspiracy law at an office briefing, CDR [redacted] called me into his office and told me that my conduct was borderline disrespectful because it put you in an uncomfortable position.)

[redacted]

[redacted]

We are rushing to put 9 more RTBs together for cases that you admit are not even close to being ready to go trial. We are also being pressed to prepare charge sheets, and you have asked that discovery letter go out on these cases. We are led to believe that representations are being made are that these cases can be prosecuted in short order, when this simply is not true.

You told the AF generals that we had no indication that al Bahlul had been tortured. It was after this statement, which CDR [redacted] quietly allowed to go uncorrected, that I brought up CDR [redacted] missing notes to the contrary. You admitted to me that you were aware that al Bahlul had made allegations of abuse.

In our meeting with OGA, they told us that the exculpatory information, if it existed, would be in the 10% that we will not get with our agreed upon searches. I again brought up the problem that this presents to us in the car on the way back from the meeting, and you told me that the rules were written in such a way as to not require that we conduct such thorough searches, and that we weren't going to worry about it.

You state in a morning meeting that al Bahlul has claimed "in every statement" that he was an AQ member. When I told you after the meeting that this was not true, you simply admitted that you hadn't read the statements but were relying on what CDR [redacted] had told you. As I have detailed in another e-mail, it does not appear that CDR [redacted] is even aware of how many statements al Bahlul has made, let alone conducted a thorough analysis.

When Maj [redacted] raises concerns about him advising the AA given the potential appearance of partiality, you advised him not to stop giving advice, but to only give advice orally.

CDR [redacted] has emphasized at morning meetings, with you in the office, that we do not need to be putting so many of our concerns in e-mails and that we can just come down and talk. Given the disparity between what is said in casual conversation and the statements made by our leadership in e-mails, it is understandable that we have relied more and more on written communications.

You have repeatedly said to the office that the military panel will be handpicked and will not acquit these detainees, and we only needed to worry about building a record for the review panel. In private you have went further and stated that we are really concerned with review by academicians 10 years from now, who will go back and pick the cases apart.

We continue to foster the impression that CITF is responsible for our troubles and lack of evidence, although we have learned in the last few weeks that we haven't even sat down with the case agents to figure out what evidence they have and how they have

gathered it. You acknowledged last week that we will not even try to fix the problems with CITF. What is perhaps most disturbing about the lack of progress by our investigative agents is that it does not appear we have ever adequately explained the deficiencies to the CITF leadership.

Our morning meetings, briefings, and group discussions are short and superficial - it could be argued designed to permit a claim that the office has discussed or debated a certain topic without permitting such meaningful discussions to actually take place. Two prosecutors were scheduled 15 minutes each to go over the facts of their case. Charge sheets are reviewed by the office the afternoon that they are to be taken over to the Deputy AA. The lay down on the general conspiracy is cursory and devoid of meaningful comments or suggestions. The fact that we did not approach the FBI for assistance prior to 17 Dec - a month after the mock trial - is not only indefensible, but an example of how this office and others have misled outsiders by pretending that interagency cooperation has been alive and well for some time, when in fact the opposite is true.

It is claimed that the Tiger Team didn't do "shit" when in fact many of the products (i.e., AQ 101 and the statement of predicate facts) that they put together almost two years ago closely mirror products that have taken us months to put together. In fact, even a cursory review of the Tiger Team materials we now have (after several efforts to get them were sharply rebuffed by our own staff) shows that the Tiger Team had articulated many of the obstacles we now face and had warned that if these obstacles were not removed that prosecutions could not succeed.

As part of this atmosphere that you fostered, Maj[redacted] was publicly rebuked for bringing this issue to the group's attention and you specifically stated that you had reviewed the tiger team materials, there was little if any usable material in them, and that the demise of the tiger team had been the result of an unfortunate personality clash and nothing else. A review of the files shows otherwise.

From June to December, you were only present in the office for brief periods, often less than [redacted] hours every two weeks. However, you continued to insist that CDR [redacted] spoke for you and directed those who e-mailed you with concerns to address them with CDR [redacted] It is difficult to believe th[redacted] deficiencies were unknown at that time, and consequently it is difficult to believe that you were unaware of the fact that we had little to no direction during that time frame. The fact that [redacted] directed each of us in the office not to speak to you directly was, and remains to me, astonishing - but does permit one to argue that they were unaware of any difficulties during a critical period of this endeavor.

One justification for the concealment and minimization of the problems has been the often stated proposition that MG Altenburg will be able to remedy many of these problems when he becomes the Appointing Authority. However, you have recently stated that MG Altenburg is a good friend of yours, that you hope he will be heavily reliant on BG Hemingway for a period of time, and that we will not be forwarding any documentation of crimes (e.g. prod analysis) to MG Altenburg which suggests that he will not be in a position to exercise independent judgment or oversight.

It is my opinion that the primary objective of the office has been the advancement of the process for personal motivations -- not the proper preparation of our cases or the interests of the American people.

The posturing of our prosecution team chiefs to maneuver onto the first case is overshadowed only by the zeal at which they hide from scrutiny or review the specific facts of their case - thereby assuring their participation.

The evidence does not indicate that our military and civilian leaders have been accurately informed of the state of our preparation, the true culpability of our accuseds, or the sustainability of our efforts.

I understand that part of the frustration with Maj [redacted] discussions with BG Hemingway was that you did not have the opportunity to discuss the matters with him in the first instance. It was clear from the discussions with BG Hemingway that he was unaware of the lack of preparation with our cases prior to signing the charges, or many of the other problems that we have discussed.

You have stated that you are confident that if you told MG Altenburg that we needed more time that he would give it to you. Underlying this comment is the fact that MG Altenburg has not been made aware of the significant shortcomings of our cases and our lack of preparation and cooperation with outside agencies.

I also have significant reason to believe that Mr. Haynes has not been advised in the most accurate and precise way. It appears that even the results and critiques of the mock trial, described like so many other efforts in this office as a "home run," were manipulated to present the maximum appearance of endorsement (for example, the reorganization and bold-face in Lt Col [redacted] critique that was openly discussed in the office)

[redacted]

The comments we have heard in the office appear to revolve around one goal - to get the process advanced to the point that it can not be turned off. We are told that we just need to get defense counsel assigned, because then they can't stop the process and we can fix the problems. We just need to get charges approved because then they can't stop the process and then maybe we can fix the problems.

If the appropriate decisionmakers are provided accurate information and determine that we must go forward on the path we are currently on, then all would be very committed to accomplishing this task. However, it instead appears that the decisionmakers are being provided false information to get them to make the key decisions, to only learn the truth after a point of no return.

It is at least possible that the appropriate officials would be more concerned about approving charges, arraigning accuseds, and signing more RTBs prior to the arguments in front of the Supreme Court if they knew the true state of the cases and the position they will be left in this fall.

[It is also unclear how the steadfast refusal to have the prosecutors co-located with the CITF agents is in the interests of the American people or the preparation of the cases, and could be motivated by anything but a purely personal issue with someone involved in the process. You have admitted that both organizations productivity would be greatly increased.]

To address at least some of the underlying issues, the following may be proposed:

1. After fully informing the sages or invitees to the Mock Trial of the deficiencies we now acknowledge, solicit their recommendations and suggested courses of action.

2. Before MG Altenburg signs in -- taking on the AA responsibility and further damaging his lucrative private practice -- fully and accurately brief him on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.

3. Fully and accurately brief Mr. Haynes and OGJ on the status of our cases, our theories of liability, and the likely timetable in which we would be able to prepare cases after al Bahlul and al Qosi.

4. Take immediate action within the office to develop a comprehensive prosecution strategy.

5. Take immediate action within the office to establish an environment that fosters openness, honesty, and ethical behavior.

6. Replace current prosecutors with senior experienced trial litigators capable of maintaining objectivity while zealously preparing for trial.

Instead, what I fear the reaction to Maj [redacted] and my concerns will simply be a greater effort to make sure that we are walled off from the damaging information - as we are aware has been attempted in the past.

I would like to conclude with the following -- when I volunteered to assist with this process and was assigned to this office, I expected there would at least be a minimal effort to establish a fair process and diligently prepare cases against significant accused. Instead, I find a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged. It is difficult to believe that the White House has approved this situation, and I fully expect that one day, soon, someone will be called to answer for what our office has been doing for the last 14 months.

I echo Maj [redacted] belief that I can not morally, ethically, or professionally continue to be a part of this process. While many may simply be concerned with a moment of fame and the ability in the future to engage in a small-time practice, that is neither what I aspire to do, nor what I have been trained to do. It will be expected that I should have been aware of the shortcomings with this endeavor, and that I reacted accordingly.

v/r,

Capt [redacted]

-----Original Message-----
From: [redacted] MAJ, DoD OGC
Sent: Thursday, March 11, 2004 16:19
To: [redacted] CAPT, DoD OGC
Cc: Borch, Fred, COL, DoD OGC
Subject: RE: Meeting with Colonel Borch and myself, 4:00 p.m. today, Col Borch's office

Ma'am

While I appreciate the sentiment, I have to tell you that I don't see a lot of use continuing to talk about this stuff, unless your looking at reassigning us out of this office. I don't intend to speak for [redacted] though I know he feels the same way, but for me I sincerely believe that this process is wrongly managed, wrongly focused and a blight on the reputation of the armed forces. I don't have anything knew to say. I am pretty sure that everyone in the world knows my sentiments about this office and this process.

Certainly there have been some unfortunate [redacted] tomatic issues like Cdr [redacted] recently heightened animosity towards [redacted] (and I'm not going to let that one go either), but my fundamental

concerns here have nothing to do with personality conflicts or intellectual disagreements.

I don't think that anyone really understands what our mission is, but whatever we are doing here is not an appropriate mission. I consider the insistence on pressing ahead with cases that would be marginal even if properly prepared to be a severe threat to the reputation of the Military Justice System and even a fraud on the American people - surely they don't expect that the fairly half-assed effort is all that we have been able to put together after all this time.

At the same time, my frank impression of my colleagues is that they are minimizing and/or concealing the problems we are facing and the potential embarassment of the Armed Forces (and the people of the United States) either because they are afraid to admit mistakes, feel powerless to fix things, or because they are more concerned with their own reputations than they are with doing the right thing. Whether I am right or wrong about that, my utter contempt for most of them makes it impossible for me to work effectively.

Frankly, I became disgusted with the lack of vision and in my view the lack of integrity long ago and I no longer want to be part of the process - my mindset is such that I don't believe that I can effectively participate - professionally, ethically, or morally.

I lie awake worrying about this every night. I find it almost impossible to focus on my part of the mission - after all, writing a motion saying that the process will be full and fair when you don't really believe it will be is kind of hard - particularly when you want to call yourself an officer and a lawyer. This assignment is quite literally ruining my life.

I really see no way to fix this situation other than reassignment. I don't want to be an obstacle to anyone, but I'm not going to go along with things that I think are wrong - and I think this is wrong. It's not like I'm going to change my opinion in order to "go along with the program." I'm only going to persist in doing what I think is right and at some point that is going to lead to even harder feelings. Half the office thinks we are traitors anyway and frankly I think they are gutless, simple-minded, self-serving, some, or all of the above so you can see how that's going to go...

I know even well-meaning people get tired of hearing this, but the fact is that I really can't stomach doing this and I really don't want to waste time talking about it.

[redacted] back yet. I think he was at [redacted] moon.

-----Original Message-----
From: [redacted] CAPT, DoD OGC
Sent: Thursday, March 11, 2004 11:36

To: [redacted]MAJ, DoD OGC; [redacted]
CPT, DoD OGC
Cc: Borch, Fred, COL, DoD OGC
Subject: Meeting with Colonel Borch and myself,
4:00 p.m. today, Col Borch's office

Major [redacted] and Captain [redacted]

[redacted]

Model Code of Judicial Conduct Canon 2

American Bar Association

2000

CANON 2: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. See also Commentary under Section 2C.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

Commentary:

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper

and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.

Commentary:

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from

membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See New York State Club Ass'n. Inc. v. City of New York, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940 (1987), 95 L.Ed.2d 474; Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

When a person who is a judge on the date this Code becomes effective [in the jurisdiction in which the person is a judge] [FN1] learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

FN1. The language within the brackets should be deleted when the jurisdiction adopts this provision.

ABA-CJC Canon 2

END OF DOCUMENT

Model Code of Judicial Conduct Canon 3

American Bar Association

2000

CANON 3 [FN2]: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General. The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law*. In the performance of these duties, the following standards apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law* and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require* order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity, and shall require* similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

Commentary:

The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

Commentary:

A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

(6) A judge shall require* lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law*. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law* to do so.

Commentary:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not

participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) A judge shall dispose of all judicial matters promptly, efficiently and fairly.

Commentary:

In disposing of matters promptly, efficiently and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in

determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with the judge to that end.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require* similar abstention on the part of court personnel* subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary:

The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by [Rule 3.6 of the ABA Model Rules of Professional Conduct]. (Each jurisdiction should substitute an appropriate reference to its rule.)

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary:

Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information* acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require* staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

(5) A judge shall not appoint a lawyer to a position if the judge either knows that the lawyer has contributed more than [$ ***] within the prior [[[***] years to the judge's election campaign, [FN3] or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter, unless

(a) the position is substantially uncompensated;

(b) the lawyer has been selected in rotation from a list of qualified and available lawyers compiled without regard to their having made political contributions; or

(c) the judge or another presiding or administrative judge affirmatively finds that no other lawyer is willing, competent and able to accept the position.

Commentary:

Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers and guardians and personnel such as clerks, secretaries and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

D. Disciplinary Responsibilities.

(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority*.

(2) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct [[[substitute correct title if the applicable rules of lawyer conduct have a different title] should take appropriate action. A judge having knowledge* that a lawyer has committed a violation of the Rules of Professional Conduct [[[substitute correct title if the applicable rules of lawyer conduct have a different title] that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority*.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

Commentary:

Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, and reporting

the violation to the appropriate authority or other agency or body.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Commentary:

A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

(c) the judge knows* that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household*, has an economic interest* in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis* interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;
(iii) is known* by the judge to have a more than de minimis* interest that could be substantially affected by the proceeding;
(iv) is to the judge's knowledge* likely to be a material witness in the proceeding;
(e) the judge knows or learns by means of a timely motion that a party or a party's lawyer has within the previous [***] year[s] made aggregate* contributions to the judge's campaign in an amount that is greater than [[[[[$ ***] for an individual or [$ ***] for an entity]]] [[is reasonable and appropriate for an individual or an entity]]. [FN4]

Commentary:

The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

(2) A judge shall keep informed about the judge's personal and fiduciary* economic interests*, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification. A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

FN2. Amended August 10, 1999, American Bar Association House of Delegates, Atlanta, Georgia, per Report 123.

FN3. This provision is meant to be applicable wherever judges are subject to public election; specific amount and time limitations, to be determined based on

circumstances within the jurisdiction, should be inserted in the brackets.

FN4. This provision is meant to be applicable wherever judges are subject to public election. Jurisdictions that adopt specific dollar limits on contributions in section 5(C)(3) should adopt the same limits in section 3(E)(1)(e). Where specific dollar amounts determined by local circumstances are not used, the "reasonable and appropriate" language should be used.

ABA-CJC Canon 3

END OF DOCUMENT

UNITED STATES OF AMERICA	)	
	)	DEFENSE MOTION
v	)	TO PROCEED *PRO SE*;
	)	RIGHT TO CHOICE OF COUNSEL
	)	
ALI HAMZA AL BAHLUL	)	
	)	30 March 2006

1. Timeliness. This motion is being filed within the time frames and other guidance established by POM 4-3 and the Presiding Officer.

2. Relief Sought. Defense requests the Presiding Officer reconsider its previous ruling and allow Mr. al Bahlul to proceed *pro se*.

3. Burden of Proof. As the President's Military Order requires a "full and fair" trial, the burden of proof is on the Prosecution to prove the current prohibition against self-representation is consistent with the President's mandate.

4. Facts.

a. During prior detailed counsel's meetings with Mr. al Bahlul in 2004, he stated that he did not want detailed defense counsel to represent him. Instead, he stated that he intended to represent himself before the commission. Prior detailed counsel requested that the Chief Defense Counsel approve a request to withdraw. The Chief Defense Counsel denied the request to withdraw specifically finding that MCO No. 1 and MCI No. 4 required detailed defense counsel to represent the accused despite the Accused's wishes.

b. After prior counsel's request to withdraw was denied by the Chief Defense Counsel, they then submitted a request to the Secretary of Defense, General Counsel of the Department of Defense, and the Appointing Authority to modify or supplement the rules for commissions to allow for withdrawal of detailed defense counsel and recognize the right of self-representation. This request was denied by the Appointing Authority in August 2005.

c. Shortly after the Appointing Authority denied the request to amend the commission rules to allow for self-representation the Secretary of Defense amended MCO No. 1. The new MCO No. 1 alters the commission structure so that they are more like a civilian trial or a court-martial.

d. Before the military commission on 11 January 2006 and again on 1 March 2006, Mr. al Bahlul stated that he wished to represent himself. Mr. al Bahlul went on to state that if he is prohibited from representing himself he desires to be represented by a Yemeni attorney of his own choosing. Finally, Mr. al Bahlul made clear that he did not wish to be represented by detailed defense counsel, and that he did not accept the services of detailed defense counsel.

e. Undersigned detailed defense counsel attempted to withdraw on several occasions,

seeking permission from both the Chief Defense Counsel and the Presiding Officer. The Chief Defense Counsel denied these requests because he interpreted commission law as still mandating that all detainees have detailed counsel. The Presiding Officer also denied these requests.

5. Law and Argument.

a. Because of the recent changes to Military Commission Order No. 1("MCO No. 1") it is even more apparent that Mr. al Bahlul has a right of self-representation and that, for the "full and fair" trial requirement of the President's Military Order to be satisfied, Mr. al Bahlul must be allowed to proceed *pro se*. Accordingly, the Presiding Officer must afford him that right.

b. MCO No. 1 was modified on 31 August 2005. Although the new MCO No. 1 does not explicitly permit an accused to represent himself, it makes significant changes to the structure of the commissions that suggests the right to self-representation cannot be denied. The military commissions are structured in a format similar to a traditional civilian court or military court-martial. The Presiding Officer serves as a judge, ruling "upon all questions of law" while the other members serve as a jury, "determine[ing] the findings and sentence without the Presiding Officer . . . ." MCO No. 1 (5); *see also* DoD OASD (PA) press release, "Secretary Rumsfeld Approves Changes to Improve the Military Commission Procedures" ("the principal effect of these changes [to MCO No. 1] is to make the presiding officer function more like a judge and the other panel members function more like a jury.") The Presiding Officer holds a position virtually identical to a civilian judge and can therefore control the proceedings and appoint standby counsel, if necessary.

c. Given that the military commission structure mirrors that of a traditional court, the protections afforded criminal defendants in such courts or courts-martial must be afforded to an accused in a military commission. Indeed, the prosecution agrees that the right of self-representation is necessary in order to afford Mr. al Bahlul a full and fair trial consistent with the President's Military Order of 13 November 2001. Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, dated 1 October 2004. Domestic and international legal history and precedent demonstrate that the right of self-representation and choice of counsel are fundamental rights the denial of which result in a denial of an accused's right to a fair trial. The President has made clear that an accused to be tried by military commission must be afforded a trial that is full and fair. In order for that direction to be implemented, the rights of self-representation and choice of counsel must be afforded to the accused.

Mr. al Bahlul has a Fundamental Right to Represent Himself before a Military Commission.

d. The President's Military Order mandates that Mr. al Bahlul receive a "full and fair" trial. In order for Mr. al Bahlul to receive a full and fair trial, he must be afforded those rights deemed fundamental. One of those rights is the right to proceed *pro se*.

e. All law, be it United States domestic law, rules for international tribunals for the prosecution of war crimes, or obligations on States under various international treaties,

recognizes an individual's basic right to represent himself. This right of self-representation "assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." *M. Cherif Bassiouni, Human Rights in the Context of Criminal Justice. Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. 235, 283 (Spring 1993).

f. The International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (AMCHR), and the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF) all recognize an accused's right to represent himself is criminal proceedings ICCPR, Article 14(3d); AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c), Bassiouni at 283. Further, the right of self-representation is enforced by The International Criminal Tribunal for the Former Yugoslavia (ICTY} and the International Criminal Tribunal for Rwanda (ICTR). Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

g. Examining the procedure of past military commissions is also very important. Both World War II tribunals at Nuremberg and the Far East recognized the right of self-representation. Both sets of tribunals also authorized an accused person to seek representation by lawyers from their home country.

h. The right of self-representation is consistent with United States law. In *Faretta v California*, the Supreme Court found "forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so." 422 U.S. 806, 807 (1975). Put another way, a person accused of a crime has a fundamental right of self-representation.

i. United States statutory law also gives litigants the right to self-represent. "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654 (2005).

j. Even at common law counsel was not forced upon a defendant. The common-law rule has always been that "no person charged with a criminal offence can have counsel forced upon him against his will." *Faretta,* 422 U.S. at 825-26 (footnotes and internal citations omitted).

k. The right of self-representation applies to an accused in a military commission no less than to an accused in a civilian court or a court-martial. In holding that detainees at Guantanamo Bay have due process rights under the Fifth Amendment, Judge Joyce Hens Green stated, "In light of the Supreme Court's decision in Rasul, it is clear that Guantanamo Bay must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply." *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 464 (D.D.C. 2005). Judge Green did not discuss detainees' Sixth Amendment rights only because *In re Guantanamo Detainee Cases* was a habeas case and "the Sixth Amendment applies only to criminal proceedings . . . ." *Id.* at 480.

l. The right of self-representation may also be grounded in the protections of the Due Process Clause. *See, e.g. Martinez v. Court of Appeal of California*, 528 U.S. 152, 165 (2000) (Scalia, J. concurring) (stating that the Due Process Clause is a valid source of a criminal defendant's right of self-

representation); *Faretta*, 422 U.S. at 818 (rights enshrined in the Sixth Amendment "are part of the 'due process of law' that is guaranteed by the Fourteenth Amendment. . . ."). Indeed, this right embedded in the Due Process Clause applies not only to the defendant; Congress must protect defendants' due process rights when legislating military proceedings. *Weiss v. United States*, 510 U.S. 163, 175 (1994) ("Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings."); *c.f. Adams v. United States*, 317 U.S. 269, 279 (1942) ("The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law."). Whether viewed from the perspective of the detainee or of Congress, the fundamental right of self-representation cannot be abrogated in a military commission.

m. The basic tenets of our legal system found in common law, statutory law, treaties, procedures of international tribunals, and the United States Constitution, are unanimous in recognizing a criminal defendant's right of self-representation. The only contrary provisions are those found in the procedural rules contained in the orders and instructions designed to implement the President's Military Order establishing the military commissions.

n. Because these instructions *implement* the President's Order, they are subservient to that Order in that if they are inconsistent with the Order they must not be applied. The President of the United States has directed that Mr. al Bahlul receive a full and fair trial. Both parties to the litigation, the Prosecution and Mr. al Bahlul, recognize that a full and fair trial must include the right of self-representation. Unless the President amends the Order stripping the "full and fair" language from it, the only way the order can be lawfully applied is to allow Mr. al Bahlul the right of self-representation.

Mr. al Bahlul has a Fundamental Right to Counsel of His Own Choosing before a Military Commission.

o. During Mr. al Bahlul's August 2004 hearing and again during his hearings in 2006, he repeatedly requested that he be allowed to be represented by an attorney from his home country of Yemen. MCO No.1 and the Military Commission Instructions require that any private attorney Mr. al Bahlul might retain must be an American citizen. This strict prohibition against foreign counsel unreasonably restricts Mr. al Bahlul's right to choose counsel.

p. Clearly, international law permits Mr. al Bahlul to choose a Yemeni attorney. Leading human rights treaties all recognize such a right. *See* the ICCPR, Article 14(3)(b) and (d), the AMCHR, Article 8(2)(d), and the CPHRF, Article 6(3)(c).

q. Further, the right to counsel of choice is enforced by the both of the current international tribunals established to prosecute violations of the law of war. The ICTY and the ICTR both allow for representation by counsel of one's own choosing before the tribunal. Statute of the ICTY, Article 21(4)(d); Statute of the ICTR, Article 20(4)(d).

r. Historically, the Nuremberg and Far East military commissions also recognized the right of

an accused to be represented by counsel of his own selection. Both sets of commissions generally required that a defense attorney simply be eligible to practice in his home country.

s. The right to choose counsel is a bedrock principle in all legitimate forums, both domestic and international. If this commission must provide a full and fair trial, a foreign national accused of war crimes must be afforded the opportunity to choose counsel from his home country. Just as an American accused of war crimes, tried by another nation, would be expected to prefer an American to defend him, so does Mr. al Bahlul prefer a Yemeni attorney to defend him. Rules governing military commissions that limit an Accused's choice of counsel based solely on the counsel's nationality impermissibly infringe on the right to present a defense, and thus are inconsistent with the President's Order and must be deemed invalid.

The Military Commission Must Respect an Accused's Right of Self-Representation and Choice of Counsel.

t. This commission is bound by customary international law, ratified treaties, and at least portions of the Uniform Code of Military Justice. When treaties are signed by the Executive and ratified by the Senate they are binding law. U.S. Constitution, Article VI, Clause 2. The ICCPR has been signed and ratified by the United States. Furthermore, the President has ordered executive departments and agencies to "fully respect and implement its obligations under the international human rights treaties to which [the United States] is a party, including the ICCPR." Executive Order 13, 107, Section 1(a), 61 Fed Reg 68,991 (1998). The Executive Order provides that "all executive departments and agencies...including boards and commissions... shall perform such functions so as to respect and implement those obligations fully." Executive Order 13,107, Section 2(a).

u. The commission is also bound by customary international law. The United States considers itself bound by customary international law in implementing its law of war obligations. Department of Defense Directive (DODD) Number 5100.77, DoD Law of War Program, December 9, 1998, paragraph 3.1 Even Field Manual 27-10 states that the law of war is derived from both treaties and customary law.

v. Finally, Article 21 of the UCMJ, which the President cites as authority for the military commissions, recognizes that jurisdiction for a military commission derives from the law of war. 10 U.S C. Section 821. Consequently, the mandates and procedures that govern the law of war must apply to these military commissions. As the law of war gives an accused the right to choose counsel, so must this military commission.

Ethical Implications of Forced Representation.

w. Rules of professional responsibility governing attorneys' conduct also recognize an individual's right to self-representation. In discussing the formation of a client-attorney relationship, one commentary observes "The client-lawyer relationship ordinarily is a consensual one. A client ordinarily should not be forced to put important legal matters into the hands of

another or accept unwanted legal services." Restatement 3d of the Law Governing Lawyers, American Law Institute (2000), § 14.

x. One of the more sobering consequences of denying Mr. al Bahlul the right of self-representation is the ethical dilemma placed on the defense counsel detailed to represent him. As Mr. al Bahlul has made clear that he does not want detailed counsel to represent him, detailed counsel has an obligation to further his "client's" wishes in that respect. If Mr. al Bahlul directs detailed counsel to not legitimize the commission system by presenting a traditional defense, detailed counsel may have to act on Mr. al Bahlul's desires. This could place detailed counsel in the position of being ordered to do something by the tribunal that is in direct conflict with his client's litigation goals.

y. It is hard to image a situation where detailed counsel can perform competently when his services are being forced upon a defendant. Rule 1.4 of the ABA Model Rules of Professional Conduct mandates that a lawyer shall reasonably communicate with the client about the means by which the client's objectives are to be accomplished and to keep the client reasonably informed about the status of the legal action. It is impossible for detailed counsel to comply with this directive in this situation. Not only do the logistical considerations of Guantanamo Bay unreasonably prohibit communication in the context of a consensual Client/Attorney relationship, but in the situation of an attorney dealing with an individual who does not want his assistance, the logistical hurdles are insurmountable.

z. *Amicus* submissions detailing the various quandaries a detailed defense counsel faces when confronted with forced representation are instructive and powerful. While the Presiding Officer's primary focus regarding the right of self-representation must be the recognition of its existence and its effect on the client, the corollary effect on the attorney is vitally important. This Commission should not be the first instance in the history of modern law to force a defendant on an unwilling, competent defendant.

The Test to Determine Whether Mr. al Bahlul is Competent to Represent Himself is Whether he is Competent to Waive the Right, not his Ability to Represent Himself.

aa. On 27 January 2006, the Presiding Officer ruled that Mr. al Bahlul was not competent to represent himself. Unfortunately, the standard applied by the Presiding Officer appeared to focus on Mr. al Bahlul's *professional ability* to represent himself, rather than his competence to waive counsel.

bb. A criminal defendant's ability to represent himself has no bearing on his competence to choose self-representation. *Godinez v. Moran*, 509 U.S 389, 399, (1993). The test then is simply whether a defendant is competent to stand trial. If he is mentally competent, if he has the ability to understand the proceedings, he is competent to waive counsel. *Id.* The Court has consistently prohibited the use of "technical legal skill" as a factor in determining whether a defendant is competent to waive his right to counsel. *Faretta*, 422 U.S. at 836. Obviously, if one waives his right to counsel he necessarily will be proceeding *pro se*.

cc. Applying the test in *Faretta* and *Godinez* Mr. al Bahlul must be allowed to self-represent. The findings of fact and conclusions of law outlined by the Presiding Officer in January speak to Mr. al Bahlul's ability, not his competence. Denying his request directly violates the President's "full and fair" trial directive.

5. Oral Argument. Oral Argument is requested. This issue is of such fundamental importance that detailed counsel must be allowed the opportunity to persuade the Presiding Officer and make a full record.

6. Witnesses. None.

7. Attachment. Prosecution Response to Defense Memorandum for Self-Representation and Right to Choice of Counsel, dated 1 Oct 2004

8. Conclusion.

a. The right to proceed *pro se* is fundamental and must be recognized if these commissions are to have even the appearance of being fair. The unreasonable restriction on Mr. al Bahlul's right to have a Yemeni attorney must also be corrected if these commissions are to comport with recognized basic rights.

b. As a nation, we would not allow one of our servicemen to be tried by a foreign government under the rules applicable to the current military commissions. We would speak out against any attempt by the enemy to force their own attorney on one of our own. To force detailed military counsel on Mr. al Bahlul is no different. As both the Prosecution and the Defense agree that a full and fair trial must encompass an individual's right to self-representation, the Presiding Officer must allow Mr. al Bahlul that right.

TOM FLEENER
MAJ, JA, USAR
Detailed Defense Counsel

UNITED STATES OF AMERICA v. ALI HAMZA AHMAD SULAYMAN AL BAHLUL	**PROSECUTION RESPONSE TO DEFENSE MEMO FOR SELF-REPRESENTATION AND RIGHT TO CHOICE OF COUNSEL** 1 October 2004

1. Timeliness This motion response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Prosecution joins the Defense in their implied requested relief to amend Commission Law and permit the Accused to represent himself in these Commission proceedings conditioned upon standby counsel being appointed. Standby counsel need to be available to.

a. Assist the Accused in his Defense consistent with the desires of the Accused,
b. Represent the Accused at closed sessions involving classified or otherwise protected information;
c Take over the representation should the Accused forfeit his right to represent himself.

3. Agreed Upon Facts. The Prosecution does not dispute the factual assertions contained in the Memorandum of Law submitted by the Defense on 2 September 2004.

4. Additional Facts. Mr. al Bahlul appeared before the Military Commission on 26 August 2004. During this appearance, the following was established:

a. The Accused clearly stated that he wished to represent himself before the Military Commission (transcript pages 6-7);
b. Other than his refusal to rise when the Commission members entered and exited the courtroom, the Accused was respectful during the Commission proceedings (see transcript in its entirety);
c The Accused is 36-years-old and has 16 years of formal education (transcript page 12);
d. The Accused stated clearly that while under no pressure from the American government, he wanted to state that he is an al Qaida member (transcript page 14);
e The Accused gave his word that he would not be loud or disruptive and that he would not make inflammatory statements if permitted to represent himself (transcript page 16)

5. Legal Authority.

a. Military Commission Instruction No. 4
b. Military Commission Order No. 1
c. Farretta v. California, 422 U.S. 806 (1975)
d. Brady v. United States, 397 U.S. 742 (1970)
e United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir 1997)
f McKaskle v. Wiggins, 465 U.S. 168 (1984)
g. United States v. Davis, 285 F 3d 378, 383 (5th Cir. 2002)
h. United States v Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir 1991)
i. United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987)
j. United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000)
k. Patterson v. Illinois, 487 U.S 285,299 (1988)
l. Torres v. United States, 140 F.3d 392, 401 (2d Cir. 1998)
m. United States v. Lane, 718 F.2d 226, 233 (1983)
n United States v Bin Laden, 58 F Supp 2d 113, 121 (S.D.N Y. 1999)
o Illinois v Allen, 397 U S 337 (1970)
p. United States v. Kaczynski, 239 F.3d 1108, 1116 (9th Cir 2001)
q. Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D Va.)
r. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998)
s United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972)
t. Barham v Powell, 595 F.2d 19, 23 (1st Cir. 1990)
u. President's Military Order of November 13, 2001, Section 4(c)(2).
v Haig v. Agee, 453 U.S. 280, 309-10 (1981)
w. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring)
x. McQueen v Blackburn, 755 F 2d 1174, 1177 (5th Cir. 1985)
y Raulerson v. Wainwright, 732 F 2d 803, 808 (11th Cir 1984)
z. Prosecutor v. Vojislav Seselj, "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No · IT-03-67-PT, 9 May 2003
aa. Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000
bb Rule for Court-Martial 502
cc. United States v. Jackson, 54 M J. 527, 535 (N.M Ct. Crim App. 2000)
dd. United States v. Steele, 53 M.J 274 (2000)
ee. Frazier v. Heebe, 482 U S. 641, 645 (1987)
ff. United States v. Grismore, 546 F.2d 844, 847 (10th Cir 1976);
gg. United States v. Whitesel, 543 F.2d 1176, 1177-81 (6th Cir. 1976),
hh. United States v. Kelley, 539 F.2d 1199, 1201-03 (9th Cir 1976)
ii. Rule 1 16(c) of Navy Judge Advocate General Instruction 5803.1B

6. Analysis

a. Current Military Commission Law Does not Permit Self-representation

Military Commission Instruction (MCI) No 4 clearly delineates that an accused cannot represent himself before a Military Commission. Section 3(D) (2) of this Instruction states that "Detailed Defense Counsel shall represent the Accused before Military Commissions" and that counsel "shall so serve notwithstanding any intention

expressed by the Accused to represent himself." While not worded as unambiguously or as strongly, Sections 4(C) (4) and 5(D) of Military Commission Order (MCO) No. 1 do nothing to contradict MCI No 4.

The Prosecution concurs with the analysis of the Chief Defense Counsel in his Memorandum of 26 April 2004 where he denied the Defense Counsel's request to withdraw from representing Mr. al Bahlul (Attached).

The Prosecution joins the Defense in their prior request that the Military Commission Instructions be amended to permit self-representation. As will be discussed in detail below, such an amendment will align Commission practice with U.S Domestic and International Law standards.

b. There is a Right to Self-representation under United States Domestic Law.

Although not binding on Commission proceedings, the right to self-representation is recognized under United States domestic law and in other judicial systems and there are compelling reasons to permit self-representation at Commission trials

The United States Supreme Court has recognized that a criminal defendant has a Constitutional right to represent himself in a criminal proceeding. Farretta v. California, 422 U S. 806 (1975). A defendant may waive his right to counsel so long as the waiver is knowing, intelligent and voluntary. See Brady v. United States, 397 U.S 742 (1970); Johnson v. Zerbst, 304 U.S 458, 468 (1938); United States v. Singleton, 107 F.3d 1091, 1095 (4th Cir. 1997). The right to self-representation must be preserved even if the trial court believes that the defendant will benefit from the advice of counsel McKaskle v Wiggins, 465 U.S. 168 (1984); United States v. Davis, 285 F 3d 378, 383 (5th Cir. 2002) (rejecting appointment of "independent counsel" to present mitigating evidence in capital case against express wishes of defendant).

Mr. al Bahlul has 16 years of formal education and demonstrated that he is very articulate and intelligent during his preliminary hearing. He did express that he only had a rudimentary understanding of the English language Regardless, a defendant's otherwise valid invocation of his right to self-representation should not be denied because of limitations in the defendant's education, legal training or language abilities. United States v Betancourt-Arretuche, 933 F.2d 89, 95 (1st Cir. 1991) (neither lack of post-high school education or inability to speak English is "an insurmountable barrier to *pro se* representation"); United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) ("To suggest that an accused who knows and appreciates what he is relinquishing and yet intelligently chooses to forego counsel and represent himself, must still have had some formal education or possess the ability to converse in English is . . . to misunderstand the thrust of Faretta and the constitutional *right* it recognized.") (emphasis in original).

c. A Detailed Inquiry is Required Before Self-representation is Permitted

In United States Federal District Courts, a detailed inquiry of the defendant is required before he is permitted to represent himself. Singleton, 107 F.3d at 1096. If *pro se* representation is permitted before a Military Commission, this safeguard should also be adopted.

An effective assertion of the right of self-representation "must be (1) clear and unequivocal; (2) knowing, intelligent and voluntary; and (3) timely." United States v. Frazier-El, 204 F.3d 553, 558 (4th Cir. 2000). To constitute a knowing, intelligent and voluntary waiver, the defendant must be aware of the disadvantages of self-representation Patterson v. Illinois, 487 U.S. 285,299 (1988); see e.g., Torres v. United States, 140 F 3d 392, 401 (2d Cir. 1998) (court should conduct on-the-record discussion to ensure that defendant was aware of risks and ramifications of self-representation).

An important facet of making a knowing, intelligent and voluntary waiver of the right to counsel is knowing the conditions under which a defendant will be permitted to represent himself. For example, the Seventh Circuit held in United States v. Lane, that a waiver of counsel is properly made when the defendant was advised that he would not be permitted unlimited legal access to research facilities away from the prison in which he was detained. 718 F.2d 226, 233 (1983). This inquiry is of significant importance in this case as Mr. al Bahlul does not possess nor will he qualify for the required security clearance necessary to review certain classified materials that have already been provided by the Prosecution as part of the discovery process

Based upon prior admissions to investigators as well as his own assertion during his initial hearing before the Commission, the Accused is an al Qaida member. He has previously stated that he fully supports Usama bin Laden's *fatwa* calling for the killing of American civilians. He has stated that all those killed in the World Trade Center on September 11th were legitimate targets. He has further admitted to pledging *bayat* to Usama bin Laden and stated that he joined al Qaida because he believed in the cause of bin Laden and the war against America. He acknowledges that he will kill Americans at the first opportunity upon release from detention

It is clear that under these unique circumstances, measures must be taken to safeguard information in the interests of national security The investigation of al Qaida and its members is an ongoing endeavor and the concerns over the premature or inappropriate disclosure of classified information are heightened. See United States v Bin Laden, 58 F. Supp.2d 113, 121 (S.D.N.Y. 1999) (government's terrorism investigation ongoing thereby increasing possibility that unauthorized disclosures might place additional lives in danger). The accused must fully comprehend the limitations required due to national security concerns and give an affirmative waiver with respect to these limitations before being permitted to proceed *pro se*.

The Prosecution has provided a proposed colloquy as an attachment to this response. While we acknowledge that a colloquy was commenced during the Accused's

initial hearing before the Commission, we feel that there must be a more in-depth inquiry before the Accused could qualify to engage in self-representation.

d. The Right to Self-representation is not Absolute and Can Be Forfeited

The Supreme Court in Farretta held that the right to self-representation is not absolute and may be forfeited by a defendant who uses the courtroom proceedings for a deliberate disruption of their trial. 422 U.S. at 834; McKaskle v Wiggins, 465 U S. 168, 173 (1984) (defendant forfeits right to represent himself if he is unable or unwilling to abide by the rules of procedure or courtroom protocol); Illinois v Allen, 397 U.S. 337 (1970); United States v Kaczynski, 239 F.3d 1108, 1116 (9th Cir. 2001) (right to self-representation forfeited when right being asserted to create delay in the proceedings) The right of self-representation is not "a license to abuse the dignity of the courtroom," nor a license to violate the "relevant rules of procedural and substantive law." Farretta, 422 U.S. at 834 n 46. Forfeiture of the right to proceed *pro se* occurred recently in the high visibility prosecutions of Zacarias Moussaoui (inappropriate and disruptive behavior) and Slobadan Milosevic (Milosevic case being tried before International Criminal Tribunal for the former Yugoslavia (ICTY) and right was forfeited based on poor health of Milosevic). See Moussaoui, Criminal No. 01-455-A. Court Order of November 14, 2003 (E.D. Va.)

Based on his demonstrated behavior at his initial hearing as well as his personal promise on the record, the Accused appears willing to abide by courtroom rules and protocol. There is currently no indication that the Accused's approach to his self-representation will change. However, should he become disruptive, the Commission and/or Appointing Authority should not hesitate to revoke his ability to proceed *pro se*. The Commission should be positioned to be able to continue the Commission trial if things change and the Accused proves to be unable to represent himself. For this and other reasons discussed below, standby counsel should be appointed.

e. Standby Counsel Should be Appointed

Once a court has decided to allow a person to proceed *pro se*, the court may, if necessary, to protect the public interest in a fair trial, appoint standby counsel. McKaskle, 465 U.S. at 173. Once standby counsel are appointed, trial courts are given broad discretion in delineating their responsibilities and defining their roles. United States v. Lawrence, 11 F.3d 250, 253 (4th Cir. 1998). This may be done over the objection of the defendant McKaskle, 465 U.S. at 184. Clear in all cases where standby counsel are present, is the notion that such counsel must be prepared to step into the representative mode should the defendant lose the right of self-representation. United States v. Dougherty, 473 F.2d 1113, 1125 (D C. Cir 1972). The only limitation to the role of standby counsel is that the participation cannot undermine the right to self-representation or the appearance before the jury as one who is defending himself. McKaskle, 456 U S at 177.

Standby counsel have conducted research on behalf of a *pro se* defendant, Barham v Powell, 895 F.2d 19, 23 (1st Cir. 1990). They have assisted with other substantive matters throughout the trial. McKaskle, 465 U S. at 180 ("Counsel made

motions, dictated proposed strategies into the record, registered objections to the prosecution's testimony, urged the summoning of additional witnesses, and suggested questions that the defendant should have asked of witnesses.").

Standby counsel cannot however interfere with the defendant's control of the case. They may express disagreement with the defendant's decisions, but must do so outside the jury's presence. Id. at 179.

The appointment of standby counsel is crucial in this case because of the interplay of classified material with this prosecution. While the Prosecution does not intend to admit any classified evidence as part of its cases on the merits or sentencing, classified materials have been provided as part of the discovery process. Standby counsel would be needed to review such information and make appropriate motions pertaining to such information. Such motions may include requests for unclassified summaries of the information they deem pertinent that could then be provided to the Accused.

In the Federal system, the role of standby counsel with respect to classified information is less intrusive to the accused's right of self-representation because such issues are normally resolved outside the presence of the jury. As the entire Commission panel is both the finder of fact and law, trial sessions dealing with issues involving classified information may be conducted in the Accused's absence before the entire Commission panel. See President's Military Order of November 13, 2001, Section 4(c)(2).

Members of this Military Commission were chosen based upon their experience and maturity. They have all had command as well as combat experience. They will already be involved in the litigation of motions and will be exposed to evidence they otherwise would not have seen had they solely been traditional finders of fact. Any impact that exposure to standby counsel litigating classified matters on the Accused's behalf will certainly not outweigh the benefit to the Accused of meeting his desire to proceed *pro se*.

While the right of self-representation is universally recognized, "it is not a suicide pact." Haig v. Agee, 453 U.S. 280, 309-10 (1981). The fundamental principle of self-preservation necessarily demands that some reasonable and well-defined boundaries may be placed on the Accused's ability to represent himself in this case. Cf. United States v. Dennis, 341 U.S. 494, 519 (1951) (Frankfurter, J., concurring). What is of the utmost importance is that the Accused be advised of these lawful limits before he waives his right to counsel with his eyes wide open. United States v. McDowell, 814 F.2d at 250; McQueen v. Blackburn, 755 F.2d 1174, 1177 (5th Cir. 1985) (court must be satisfied accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right that he is waiving); Faulkenson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984) ("Once there is a clear assertion of that right [self-representation], the court must conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel"). If the Accused can show that he fully understands that he will not have access to classified information and he voluntarily continues to assert his desire for self-representation, he should be permitted to proceed *pro se*.

In summary, standby counsel should be appointed regardless of the Accused's desires. They are needed to assist the Accused consistent with his desires, represent the Accused on matters related to classified information and be prepared to assume full representation should the accused forfeit his right to represent himself.

f Right of Self-representation under International Law

The Prosecution agrees with the Defense assertion that the right of self-representation is fully recognized under International Law. The Prosecution does contend that the Defense Memorandum is at times misleading as it implies that various international treaties mandate this Commission to permit self-representation. They fail to note that with respect to many of the treaties they mention, the United States is either not a party, or did not ratify these documents. See, Additional Protocol I to the Geneva Conventions; American Convention on Human Rights, Convention for the Protection of Human Rights and Fundamental Freedoms.

With respect to the International Covenant on Civil and Political Rights (ICCPR), the United States has signed and ratified this treaty However its applicability and binding effect on the United States is not as simple and straightforward as the Defense opines. A lengthy discussion on this issue is unnecessary at present as the Prosecution believes that the right to self-representation should be provided to give what has been recognized as a fundamental right both domestically and internationally.

g. Standby Counsel and Forfeiture of the Right to Self-representation are Recognized Under International Law

In Prosecutor v Vojislav Seseli, the ICTY recognized that a counsel can be assigned to assist an accused engaging in self-representation on a case by case basis in the interests of justice "Decision on Prosecution's Motion for Order Appointing Counsel to Assist Vojislav Seselj", Case No : IT-03-67-PT, 9 May 2003 paras 20-21. Noting that the right to self-representation is a starting point and not absolute, the Tribunal asserted its fundamental interest in a fair trial related to its own legitimacy in justifying the appointment of standby counsel Id.

The recognition of the appropriateness of imposition of defense counsel on an accused was emphasized in a decision of the International Criminal Tribunal for Rwanda (ICTR). Prosecutor v. Jean-Bosco Barayagwiza, ICTR-97-19-T, 2 November 2000 para 24 Similar to our present case, Barayagwiza instructed his attorneys "not to represent him in the courtroom" and as a result they initially remained passive and did not mount a defense Id. at para 17 These attorneys requested to withdraw from representation and their request was denied by the Trial Chamber. Id at paras 17-20. Viewing the accused's actions as a form of protest and an attempt to obstruct the proceedings, counsel were deemed to be under no obligation to follow the accused's instructions to remain passive Id. at paras 21-24. In his concurring opinion, Judge Gunawardana opined that the counsel should more appropriately be classified as "standby counsel" whose obligations were not just to protect the interests of the accused, but also the due

administration of justice. Barayagwiza, Concurring and Separate Opinion of Judge Gunawardana (relying on Article 20(4) of the ICTR Statute)

b. The Accused's Alternative Request to be Represented Exclusively by an Attorney from Yemen should be Denied

Section 4(C)(3)(b) of MCO No. 1 requires a civilian attorney representing an accused to be: (1) a United States citizen; (2) admitted to practice law in a State, district, territory, or possession of the United States, or before a Federal court; (3) has not been subject to any sanction or disciplinary action . . (4) has been determined eligible for access to SECRET information; and (5) agrees in writing to comply with all regulations or instructions for counsel. It is clearly evident that a Yemen citizen attorney who is not eligible to practice law in the United States does not meet these criteria

Additionally, the Accused's first fallback request is not in accord with Section 4(C)(3)(b) of MCO No.1 as his request for representation is conditioned upon his current detailed military Defense Counsel having absolutely no role in his representation. This conflicts directly with MCO No 1 where it states that representation by a Civilian Defense Counsel will not relieve Detailed Defense Counsel of their duties specified in Section 4(C)(2). Similarly, even a cleared Civilian Counsel is not guaranteed the ability to be present at closed Commission proceedings MCO No 1 Section 4(C)(3)(b); MCI No 4, Section 3(F).

There are sound reasons for the requirements imposed on civilian counsel. As explained by the Presiding Officer in the Accused's initial hearing, there is great importance in counsel having expertise in military law, military terminology, and the ability to argue by analogy to federal, U.S military and international law (transcript pages 7-9) Furthermore, as already demonstrated by the Defense's attempt to utilize a non-citizen interpreter in this case, it can take upwards to a year (if ever) to do the background investigation necessary for an appropriate security clearance to be granted. Several months have already been lost in the trial preparation process awaiting the granting of this clearance (which has still not been obtained). Protocol and procedures cannot be disregarded when it comes to national security. The time commitment for obtaining a security clearance would not be consistent with Section 4(A)(5)(c) of MCO No. 1 where the Presiding Officer is tasked to ensure an expeditious trial where the accommodation of counsel does not delay the proceedings unreasonably.

In the court-martial setting, Rule for Court-Martial 502(d)(3) requires that a civilian counsel representing an accused be "[a] member of the bar of a Federal court or of the bar of the highest court of a State." Absent such membership, the lawyer must be authorized by a recognized licensing authority to practice law and must demonstrate to the military judge that they have the demonstrated training and familiarity with criminal law applicable to courts-martial. RCM 502(d)(3)(B) For practical purposes, the civilian counsel must in fact be a lawyer who is a "member in good standing of a recognized bar." United States v. Jackson, 54 M.J. 527, 535 (N.M. Ct Crim App 2000) The Prosecution is unaware of any caselaw questioning the propriety of these conditions. The decisions of military and other federal courts reflect that admission to practice is a

right and justice." Any request for a Yemen attorney to act as a foreign attorney consultant should be looked upon favorably assuming all preconditions are met.

8. Attached Files

a Chief Defense Counsel Memorandum dated 26 April 2004
b Moussaoui, Criminal No. 01-455-A, Court Order of November 14, 2003 (E.D Va.).
c. Proposed colloquy.

[redacted]
Commander, JAGC, USN
Prosecutor

UNITED STATES OF AMERICA	**D 104 Al Bahlul**
v.	**Prosecution Response** to Defense Motion Challenging the Presiding Officer
ALI HAMZA SULAYMAN AL BAHLUL	**31 March 2006**

1. Timeliness. This response is being filed within the timeframes established in POM 4-3, 20 Sep 05.

2. Relief. Defense motion should be denied.

3. Facts. The Prosecution generally agrees with the facts as stated by Defense, but provides the following additional facts:

a. Prosecution conducted voir dire of the Presiding Officer on 11 Jan 06 and did not challenge the Presiding Officer. Defense was granted a continuance to conduct voir dire at a future session.

b. On 7 Feb 06 Prosecution and Defense were notified via e-mail of the agenda for the March 2006 trial session. This e-mail set 16 Feb 06 as the deadline for filing additional voir dire questions for the Presiding Officer. 21 Feb 06 was the due date for written objections to the Appointing Authority Standard for Challenging the Presiding Officer.

c. On 16 Feb 06 Defense Counsel was granted a continuance until 21 Feb 06 to file his additional written voir dire questions. Prosecution notified all parties that it did not intend to file additional voir dire.

d. On 21 Feb 06 Defense Counsel filed additional written Presiding Officer voir dire. Neither Prosecution nor Defense filed documents challenging the Appointing Authority Standard for Challenging the Presiding Officer.

e. On 24 Feb 06 the Presiding Officer filed a written response to Defense proposed voir dire. In his response the Presiding Officer declined to answer 44 of 93 questions because they were either irrelevant or inappropriate, or both.

f. On 1 Mar 06 Defense conducted oral voir dire, questioning the Presiding Officer extensively about a wide variety of topics, including some of the unanswered written questions. Defense then challenged the Presiding Officer for cause, asserting that the Presiding Officer was not independent, that the Presiding Officer lacked qualifications and that an appearance of bias existed due to what the Defense characterized as a close relationship between the Presiding Officer and the Appointing Authority.

g. On 1 Mar 06 the Presiding Officer denied Defense challenge for cause. In doing so, the Presiding Officer applied the Appointing Authority standard and the implied bias standard under RCM 902 and cited both 902 and the Federal standard contained with 28 USC 455. The Presiding Officer gave Defense until 22 Mar 06 to file a supplemental matters regarding the basis for his challenge for cause.

h. On Tuesday, 21 Mar 06 Defense Counsel served as a speaker at an Amnesty International-sponsored forum at George Mason University.

i. On 22 Mar 06 Defense asked for and received a continuance until 24 Mar 06 to file his supplemental matters regarding his challenge for cause.

j. Shortly after close of business on 24 Mar 06 Defense filed a rough draft of his supplemental brief regarding his challenge for cause. The finalized brief was accepted Monday morning, 27 Mar 06.

4. Discussion. Defense argues for the rejection of the Appointing Authority standard for a challenge for cause articulated in RE 153 in favor of the adoption of RCM 902 and reiterates its original challenge for cause asserting the Presiding Officer should be removed because he is not competent, lacks independence, and his continued service as Presiding Officer creates an appearance of bias based primarily on his prior relationship with the Appointing Authority. The challenge was denied on 1 Mar 2006 and Defense offers no new argument or evidence to compel a change to that original ruling.

a. Standard to Challenge a Presiding Officer for Cause. Paragraph 3(A) of MCI #8, which was promulgated after the change to MCO No.1, requires the application of the Appointing Authority standard articulated in RE 153, which includes an implied bias standard of RCM 902 advocated by Defense. Defense failure to respond in a timely manner constituted a waiver. Moreover, being that the Presiding Officer already applied the RCM 902 standard, there is no reason to relitigate its use.

b. Competence of the Presiding Officer. Defense concedes that Colonel Brownback meets the qualifications to serve as Presiding Officer. As such, the supplemental Defense submission regarding the competence of the Presiding Officer is without a legal basis and should be dismissed.

c. Appearance of Bias and Lack of Independence. Defense does not supplement its original oral argument with additional information and, therefore, there is no reason to reverse the denial of Defense challenge. Moreover, the record regarding the appearance of Presiding Officer bias has been fully developed in the record and the argument was rejected by both the Appointing Authority (RE 153) and the Presiding Officer, on 1 Mar 06, using an implied bias standard.

5. Burdens. The moving party has the burden to establish grounds for recusal or removal. Also, RCM 902 would require a military judge sua sponte to recuse himself, if required under the articulated standard.

6. Oral Arugument. No further argument is warranted. However, if further argument is granted, the Prosecution reserves the right to respond.

7. Witnesses and Evidence. None.

8. Additional Information. None.

9. Attachments. None.

10. Submitted by:

[redacted]
LTC, USAF
PROSECUTOR
/s/

LCDR [redacted] JAGC, USN
MAJ [redacted] USA
LT [redacted] JAGC, USN
Assistant Prosecutors

Index of Current POMs – April 4, 2006

See also: http://www.defenselink.mil/news/Aug2004/commissions_memoranda.html

Number	Topic	Date
1 - 2	Presiding Officers Memoranda	September 14, 2005
2 - 2	Appointment and Role of the Assistant to the Presiding Officers	September 14, 2005
3 - 1	Communications, Contact, and Problem Solving	September 8, 2005
4 - 3	Motions Practice	September 20, 2005
5 - 1 *	Spectators at Military Commissions	September 19, 2005
6 - 2	Requesting Conclusive Notice to be Taken	September 9, 2005
7 - 1	Access to Evidence, Discovery, and Notice Provisions	September 8, 2005
8 - 1	Trial Exhibits	September 21, 2005
9 - 1	Obtaining Protective Orders and Requests for Limited Disclosure	September 14, 2005
10 - 2	Presiding Officer Determinations on Defense Witness Requests	September 30, 2005
11	Qualifications of Translators / Interpreters and Detecting Possible Errors or Incorrect Translation / Interpretation During Commission Trials	September 7, 2005
12 - 1	Filings Inventory	September 29, 2005
13 - 1 *	Records of Trial and Session Transcripts	September 26, 2005
14 - 1 *	Commissions Library	September 8, 2005
(15)	There is currently no POM 15	
16	Rules of Commission Trial Practice Concerning Decorum of Commission Personnel, Parties, and Witnesses	February 16, 2006
(17)	There is currently no POM 17	
18	8-5 Conferences	March 21, 2006

* - Also a joint document issued with the Chief Clerk for Military Commissions.

AL BAHLUL
REVIEW EXHIBIT 184

Review Exhibit (RE) 184 is curriculum vitae of Translators "A" and "B."

RE 184 consists of 7 pages.

Translators A and B have requested, and the Presiding Officer has determined that RE 184 not be released on the Department of Defense Public Affairs web site. In this instance Translators A and B's right to personal privacy outweighs the public interest in this information.

RE 184 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 184.

//signed//

M. Harvey
Chief Clerk of Military Commissions

From:	Hodges, Keith H CIV USSOUTHCOM JTFGTMO
To:	[redacted]
CC:	
Subject:	FW: AA denies stay for al Bahlul-31 Mar 06
Date:	Tuesday, April 04, 2006 6:39:15 PM
Attachments:	al Bahlul Defense Stay Request (30 Mar 06) (4 pages).pdf al Bahlul - AA"s Answer to Def Req for Stay (31 Mar 06) (1 page).pdf

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Please combine the two attachments into one, make an RE. Title: DDC request to AA to stay proceedings and AA denial of same.

Should be 185. Current list attached.

Keith Hodges
Assistant to the Presiding Officers
[redacted]

-----Original Message-----
From: Brownback, Peter E. COL USSOUTHCOM JTFGTMO
Sent: Tuesday, April 04, 2006 6:10 PM
To: Hodges, Keith H CIV USSOUTHCOM JTFGTMO
Subject: FW: AA denies stay for al Bahlul-31 Mar 06

-----Original Message-----
From: [redacted]USSOUTHCOM JTFGTMO
Sent: Tuesday, April 04, 2006 3:26 PM
To: Hodges, Keith H CIV USSOUTHCOM JTFGTMO; Brownback, Peter E. COL USSOUTHCOM JTFGTMO
Cc: Davis, Morris D Col USSOUTHCOM JTFGTMO; [redacted]
Subject: FW: AA denies stay for al Bahlul-31 Mar 06

COL Brownback -
The Prosecution received the attached ex parte request by MAJ Fleener to the Appointing Authority and the Appointing Authority's response via the email below. We believe it appropriate to provide these documents to the Presiding Officer so that the Presiding Officer is aware of the Defense request and the Appointing Authority's action.
V/R
[redacted]
MAJ, US Army
Prosecutor
Office of Military Commissions - Prosecution
OGC DOD
[redacted]

-----Original Message-----
From: [redacted]CTR USSOUTHCOM JTFGTMO
Sent: Tuesday, April 04, 2006 12:23 PM
To: [redacted]
JTFGTMO; [redacted]USSOUTHCOM JTFGTMO
Subject: RE: AA denies stay for al Bahlul-31 Mar 06
A copy of the defense request for stay, and the Appointing Authority's reply are attached. COL Sullivan, please pass this information to Major Fleener, who I believe to be on leave.
I have not provided these documents to Mr. Hodges--the decision whether to provide these documents to him is up to the defense and prosecution to decide.
Thanks,
M. Harvey
CCMC

-----Original Message-----
From: [redacted]CTR USSOUTHCOM JTFGTMO
Sent: Monday, April 03, 2006 10:47 PM
To: [redacted]

[redacted]

Subject: AA denies stay for al Bahlul-31 Mar 06

<< File: al Bahlul - Defense Request for Stay (31 Mar 06) (1 page).pdf >>

Mr. [redacted] asked me to email the attachment to the parties. COL Sullivan, if you could contact MAJ Fleener at his leave address and inform him that the stay he requested is denied, I would appreciate it.

I have not provided the attachment to Mr. Hodges or the Presiding Officer.

I do not have a copy of the request referred to in para. 1 of this memorandum, but I can ask Mr. [redacted] for a copy, if anyone wants to see it.

I do have a copy of the Appointing Authority's memorandum of June 14, 2005, referred to in para. 2 of this memorandum. It is already a Review Exhibit in al Bahlul, but send me an email if you want me to provide it.

Regards,

M. Harvey

CCMC

OFFICE OF THE SECRETARY OF DEFENSE
OFFICE OF MILITARY COMMISSIONS
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

LEGAL ADVISOR TO THE
APPOINTING AUTHORITY

MEMORANDUM FOR MAJOR TOM FLEENER March 31, 2006

SUBJECT: Request for Stay of Proceedings Pending Detailed Defense Counsel's Request to Amend Commission Rules in the Case of United States v. al Bahlul

1. Yesterday, March 30, 2006, my office received your attached request to stay the proceedings and amend MCO No. 1. By way of explanation, permit me to lend some historical perspective.

2. On June 14, 2005, I denied your client's request to represent himself before a military commission. In that same memorandum, I informed the Chief Defense Counsel that I did not support your predecessors' request to change MCO No. 1 to permit *pro se* representation.

3. In January 2006, Mr. al Bahlul personally requested that he be permitted to represent himself.

4. On January 27, 2006, the Presiding Officer made findings of fact and conclusions of law before denying Mr. Bahlul's request to proceed *pro se*. You were invited to submit a draft ruling to the Presiding Officer on this issue but declined to do so.

5. Mr. al Bahlul's next hearing is scheduled for the April 3-6, 2006 hearing term.

6. The "recent change" to MCO No. 1 which you now invoke, on the eve of trial, as the reason proceedings should be stayed and your client's *pro se* status revisited, was promulgated on August 31, 2005 – more than six months ago. More than 60 days have elapsed since the Presiding Officer denied Mr. al Bahlul's request to proceed *pro se*.

7. I decline to exercise any authority I may have to grant your request to stay the proceedings in the above-styled case and I adhere to the determinations in my memo of June 14, 2005. I am immediately forwarding your request to change MCO No.1 to the General Counsel, Department of Defense.

FOR THE APPOINTING AUTHORITY

THOMAS L. HEMINGWAY
Brigadier General, USAF
Legal Advisor to the Appointing Authority
For Military Commissions

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

30 March 2006

MEMORANDUM FOR Mr. John Altenburg, Appointing Authority

SUBJECT: Request for Stay of Proceedings Pending Detailed Defense Counsel's Request to Amend Commission Rules in the Case of *United States v. al Bahlul*

1. Detailed Defense Counsel ("Defense") respectfully requests that the Appointing Authority stay these proceedings in light of Defense's pending request to the Secretary Defense to amend the Commission rules denying Mr. Al Bahlul the right to represent himself and revise it in a manner consistent with domestic and international law. Pursuant to Military Commission Order No. 1, 6(B)(4), the Appointing Authority has the authority to stay these proceedings.

2. As the Appointing Authority well knows, the US Supreme Court recently heard the case of *Hamdan v. Rumsfeld.* Soon, the Court will provide definitive guidance regarding not only the authority and jurisdiction for military commissions but also the rights that individuals taken before those commissions have. As Mr. al Bahlul is harmed every time detailed counsel is forced to speak "for" him, until the Court either strikes down the commissions system or affirms the lower court, this case should be stayed. This delay would also give the Appointing Authority the time needed to change the commission rules to comport with the law by allowing for self-representation.

TOM FLEENER
Major, JA, US Army Reserve
Detailed Defense Counsel

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
OFFICE OF MILITARY COMMISSIONS

30 March 2006

MEMORANDUM FOR Mr. John Altenburg, Appointing Authority

SUBJECT: Request For Modification of Military Commissions Rules to Recognize the Right of Self-Representation in the Case of *United States v. al Bahlul*

1. I was detailed by the Chief Defense Counsel, Office of Military Commissions in November 2005, to represent Ali Hazma Ahmed Sulayman al Bahlul in proceedings before a Military Commission. I have met with Mr. al Bahlul on several occasions both in the detention facility and in the commission building at Guantanamo Bay, Cuba. During each of those meetings Mr. al Bahlul informed me that he did not desire my services or the services of any other American counsel, military or civilian. Rather, Mr. al Bahlul wishes to represent himself in any Military Commission proceeding.

2. In December 2005 and again in January 2006, I requested permission of the Chief Defense Counsel to withdraw as Mr. al Bahlul's detailed counsel. Chief Defense Counsel denied that request based on his interpretation of the Commission rules requiring him to detail counsel notwithstanding any request to proceed *pro se*.

3. In January 2006 and again in March 2006, I sought permission from the Presiding Officer of Mr. al Bahlul's military commission to withdraw as detailed defense counsel. The Presiding Officer denied my requests to withdraw based primarily on the language in the MCIs and MCO that appear to mandate continued representation.

4. I respectfully request you exercise your authority to modify or supplement the rules of these commissions so as to allow withdrawal by detailed defense counsel and recognize the right of persons to represent themselves before Military Commissions.

5. In action on this request, I ask you consider the fact that while obviously United States Constitutional law recognizes an individual's Sixth Amendment right to self-representation, international law also recognizes the right of self-representation before criminal tribunals,[1] as do the Rules for Courts-Martial[2]. *See* Memorandum of Law In Support of Request to Amend Commission Law to Allow Right to Self-Representation, dated March 30 2006; Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, dated 1 October 2004 (attached) for a detailed explanation of the historical right to self-representation. Further, while the rules governing Military Commissions presently do not appear to provide a mechanism for such, I invite you to consider the significant ethical difficulties that have arisen as a result of counsel being required to represent an accused who wishes to represent himself.

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[1] Article 21(4)(d), Statute of International Criminal Tribunal for the Former Yugoslavia, Article 20(4)(d), Statute of the International Criminal Tribunal for Rwanda.

[2] Rules for Courts-Martial 506(c).

SUBJECT: Request For Modification of Military Commissions Rules to Recognize the Right of Self-Representation in the Case of *United States v. al Bahlul*

6. I further note Military Commission Order No. 1 ("MCO No. 1") was modified on August 31, 2005. Although the new MCO No. 1 does not explicitly permit an accused to represent himself, it makes significant changes to the structure of the Commission that suggest the right to self-representation should be afforded to an accused. Current MCO No. 1 structures the Commission in a manner similar to a traditional court martial or civilian court in that the Presiding Officer acts like a judge and the other Commission Members act like members of a jury.

7. Specifically, MCO No. 1 provides that the Presiding Officer "shall rule upon all questions of law," while the other members "determine the findings and sentence without the Presiding Officer . . . ." (MCO No. 1, (5)). The revised Commission structure gives the Presiding Officer a great deal of authority to control the proceedings and the ability to intervene, if necessary, to protect the accused's rights. Further, military counsel should be made available to serve as standby counsel.

8. Importantly, the Prosecution agrees that the right to self-representation is necessary for a full and fair trial. *See* Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, dated 1 October 2004.

9. In order to comport with domestic and international law, the Commission rules should be changed to permit self-representation of an accused. At a minimum MCI No. 4, para. 3(B)(11) and the last sentence of 4(D)(2) should be deleted. MCO No. 1, para. 4C(4) may also be amended to reflect that, "If standby counsel is appointed, such counsel must be present during all proceedings."

10. I am of the belief that you have the authority to make the changes necessary to the rules to allow Mr. al Bahlul to represent himself. If you are of the opinion that you do not have the authority, or if you are not inclined to grant this request, please forward this request to the appropriate authority.

11. Because this matter obviously involves pending litigation, please inform me whether you are going to act on this request or to whom you are going to forward it. Time is of the essence and I will have to seek legal redress if this request is going to be denied.

SUBJECT: Request For Modification of Military Commissions Rules to Recognize the Right of Self-Representation in the Case of *United States v. al Bahlul*

12. Attachments:

a. Memorandum of Law In Support of Request to Amend Commission Law to Allow Right to Self-Representation, dated March 30 2006

b. Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel, dated 1 October 2004

c. *Godinez v. Moran*, 509 U.S. 389 (1993)

d. *Torres v. United States*, 140 F. 3d 392 (2d Cir. 1998).

TOM FLEENER
Major, JA, US Army Reserve
Detailed Defense Counsel

OFFICE OF MILITARY COMMISSIONS
DEPARTMENT OF DEFENSE
BEFORE THE PRESIDING OFFICER

UNITED STATES	)	MOTION OF LAW
	)	PROFESSORS AND
v.	)	OTHER ATTORNEYS
	)	FOR LEAVE TO FILE
ALI HAMZA AHMED SULAYMAN AL BAHLUL,	)	MEMORANDUM AS
	)	*AMICUS CURIAE* AND
Accused.	)	MEMORANDUM AS
	)	*AMICUS CURIAE*

The below attorneys respectfully move for leave to file the following memorandum as an *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The below listed attorneys are law professors and other interested lawyers in the State of Wyoming. All of the undersigned appear regularly before courts of the state of Wyoming or of the United States, or are educators of present and future Wyoming attorneys; as such, they have an interest in ensuring that Wyoming upholds high standards of ethical conduct for its attorneys and that those standards are respected in the courts and tribunals in which Wyoming attorneys appear.

ARGUMENT IN SUPPORT OF MOTION FOR LEAVE TO FILE

The President's Military Order, the Secretary's Military Commission Orders, and the various Military Commission Instructions are silent on the issue of the appearance of *amici curiae* before the commission. However, Military Commission Instruction No. 9, dealing with the Review Panel, gives that body discretion to review *amicus* submissions. MCI No. 9, ¶ 4.C.4.c.

It is established practice that courts and tribunals regularly receive amicus submissions. There is no reason why submissions should not be entertained in this case. WHEREFORE, it is requested that this tribunal accept the attached memorandum submitted by *amicus curiae*.

Respectfully submitted this 3rd day of April, 2006.

By: _____

Professor John M. Burman
University of Wyoming College of Law
1000 E. University Ave., Dept. 3035
Laramie, WY 82071
(307)766-2165

On behalf of the following as amicus curiae:

John M. Burman, Professor, University of Wyoming College of Law
Diane Courselle, Associate Professor, University of Wyoming College of Law
James Delaney, Assistant Professor, University of Wyoming College of Law
Stephen Feldman, Jerry W. Housel/Carl F. Arnold Distinguished Professor of Law, University of Wyoming College of Law
Timothy Kearley, Professor & Director of Law Library, University of Wyoming College of Law
Nancy Sharp NtiAsare, Adjunct Professor, University of Wyoming College of Law
Mary Dee Pridgen, Associate Dean & Professor, University of Wyoming College of Law
Robert Wroe Southard, Visiting Assistant Professor, University of Wyoming College of Law

Kenneth Koski, Wyoming Public Defender, Cheyenne, WY
Michael J. Krampner, attorney, Casper, WY
Nick Beduhn, attorney/public defender, Cody, WY
Robert A. Jones, assistant public defender, Sheridan, WY
Carol A. Serelson, attorney/public defender, Cheyenne, WY
Cindi Wood, attorney/public defender, Casper, WY

OFFICE OF MILITARY COMMISSIONS
DEPARTMENT OF DEFENSE
BEFORE THE PRESIDING OFFICER

UNITED STATES	)	
	)	
v.	)	
	)	
ALI HAMZA AHMED SULAYMAN AL BAHLUL,	)	MEMORANDUM AS
	)	*AMICUS CURIAE*
Accused.	)	
	)	

MEMORANDUM AS *AMICUS CURIAE*

Argument

SELF-REPRESENTATION MUST BE PERMITTED

Almost lost in the dispute over Mr. al-Bahlul's right to appear *pro se* is the effect on his lawyer of denying that right. It should not be. Forcing a lawyer to represent a client who does not want him not only deprives the client of an important right, it also places the attorney in an impossible ethical bind, subjecting him to potential liability for misconduct.

I. Ethical Background

Major Tom Fleener is a member of the United States Army Reserves Judge Advocate General's Corps, and the Iowa and Wyoming bars. Immediately prior to being activated and assigned to represent Mr. al Bahlul, Major Fleener practiced law in Cheyenne, Wyoming. After his tour of duty, he intends to return to practice in Wyoming. So while he is a member of both the Iowa and Wyoming bars,[1] Major Fleener has and will practice primarily in Wyoming.

[1] Both Iowa and Wyoming have adopted a form of the American Bar Association's Model Rules of Professional Conduct. *See,* IOWA RULES OF PROF'L CONDUCT (2005), and WYOMING RULES OF PROF'L

The rules of the Appointing Authority specify that while practicing before the military commission ("the Commission"), Major Fleener remains subject to "State [Iowa and Wyoming[2]] and branch specific [Army] armed forces Rules of Professional Conduct . . . ."[3] In addition, Major Fleener is required to comply "with all rules, regulations, and instructions applicable to trials by military commission . . . [and they] shall be deemed a professional responsibility obligation for the practice of law within the Department of Defense."[4]

The rules of the Appointing Authority anticipate that there may be conflicts between the rules, regulations and instructions of the Commission and the Rules of Professional Conduct in one of the jurisdictions that licenses the lawyers who appear before the Commission. Given the rules of the Appointing Authority (which depart significantly from the ethical standards that generally guide lawyers), the instructions that have been given to lawyers who are appearing before the Commission, and the general ethical standards that govern lawyers, conflicts are not just possible, they are probable, and they are likely to be significant. That, in fact, is precisely

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CONDUCT (2005). While there are many similarities, there are some differences. Those differences do not alter Major Fleener's responsibilities with respect to Mr. al-Bahlul's expressed desire to not have Major Fleener, or any other American lawyer, represent him, and that he would prefer to proceed *pro se.* The critical rule, the rule which governs declining or terminating representation, is substantially similar. The rule in Iowa says: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." IOWA RULES OF PROF'L CONDUCT, R. 32:1.16(c) (2005). The rule in Wyoming says: "When ordered to do so by a tribunal, a lawyer may continue representation notwithstanding good cause for terminating the relationship." WYOMING RULES OF PROF'L CONDUCT, R. 1.16(c) (2005).

[2] WYOMING RULES OF PROF'L CONDUCT, R. 8.5 (2005) ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.")

[3] DEPARTMENT OF DEFENSE, APPOINTING AUTHORITY REGULATION No. 3, 3.A (November 17, 2004).

[4] *Id.*

what has happened here. Significant conflicts have arisen, placing Major Fleener, and other lawyers similarly situated, in an irreconcilable ethical dilemma.

The problem began when Secretary of Defense Donald H. Rumsfeld issued Military Commission Order No. 1, defining "Procedures for Trial by Military Commission of Certain Non-United States Citizens in the War Against Terrorism." Paragraph 4 of that order provides that "[t]he accused must be represented at all relevant times by detailed defense counsel." Major Fleener was detailed to represent Mr. al-Bahlul. Although so detailed, he remains subject to the Wyoming Rules of Professional Conduct, which impose duties on him that are in direct conflict with the above order.

The Appointing Authority's regulations say that in the event of a conflict between a lawyer's professional obligations to the Commission and the rules of the jurisdiction which licenses a lawyer who is practicing before the Commission, such as Major Fleener who is licensed in Wyoming, "the Appointing Authority for Military Commissions or the Presiding Officer . . . shall apply the rules, regulations and instructions applicable to trials by military commission only after the Legal Advisor to the Appointing Authority . . . coordinates with . . . the appropriate officials of other jurisdictions."[5] There is no indication that such "coordination" has occurred, or even what "coordination" means. As "coordination" has not occurred, the rules of the licensing jurisdictions (Iowa and Wyoming) should apply, not the "rules, regulations and instructions" of the Commission. Since the Iowa Bar Association has issued an opinion authorizing Major Fleener to represent a client who does not want him, the question becomes

[5] *Id.*

what should or must Major Fleener do or not do under the Wyoming Rules of Professional Conduct in the absence of an opinion on point. The Iowa opinion also leaves unanswered what it means to "represent" a client, leaving Major Fleener at sea on that critical issue.

Major Fleener requested and received an opinion from the Iowa Bar on whether he could ethically represent a client who does not want him. That opinion, issued on February 24, 2006, concluded that he could. "Complying with the tribunal's order to represent al-Bahlul's interest is discharging [Major Fleener's] duty as an officer of the court." While that opinion may be a defense to any subsequent disciplinary action initiated by or brought before the Iowa Bar, it does not define Major Fleener's duties under the Wyoming Rules of Professional Conduct. Not only is the opinion not binding in Wyoming, it does not even attempt to answer the even more difficult ethical question of what it means to "represent" a client.

Although the Wyoming Bar has a mechanism to request an advisory opinion about an ethical matter, whether to issue one is discretionary with bar counsel.[6] As of this date, no opinion has been forthcoming. There is, therefore, no ruling in Wyoming from any source which is authoritative.

The Department of the Army has also issued an opinion about whether an attorney may ethically represent a client who does not want him. That opinion, issued on January 5, 2006, concludes that "the Army attorney appointed to represent Mr. al Bahlul may be directed to continue representation of him . . . ."[7] The attorney, however, "still remains subject to military

[6] WYOMING DISCIPLINARY CODE, § 25 (2006).

[7] DEPARTMENT OF THE ARMY, STANDARDS OF CONDUCT OFFICE MEMORANDUM ¶ 1

and state bar rules and can be sanctioned for violation."[8] Finally, the opinion notes that:

> You have not indicated whether the defense counsel in question faces a conflict between the Army Rules of Professional Conduct and his or her state bar rules. If there is such a conflict, he or she should seek guidance from the supervisory attorney and this conflict should be brought to the attention of the Presiding Officer and/or Appointing Authority.[9]

II. The Conflicts

Major Fleener faces myriad conflicts between the regulations, rules and instructions of the Commission and the requirements of the Wyoming Rules of Professional Conduct. The primary question which he faces is how to resolve those conflicts. Many of the issues involve or revolve around Mr. al-Bahlul's expressed desire to appear *pro se*, and his concomitant desire not to have Major Fleener represent him.

While Major Fleener faces a host of ethical issues, two problems dwarf the others, at least initially: (1) whether an attorney-client relationship may be created over the objections of the client; and (2) if the answer to the first question is yes, what does it mean, in general, to "represent" a client and, in particular, may Major Fleener disregard the objectives for the representation established by Mr. al-Bahlul.

(January 6, 2006).

[8] *Id.*

[9] *Id.* at ¶ 4.

III. An Attorney May Not Ethically Enter into an Attorney-Client Relationship with a Client Who Does Not Wish to Have the Attorney Represent Him.

The Wyoming Rules of Professional Conduct (and the rules of ethics, generally) do not define when an attorney-client relationship arises, or the nature of that relationship when it does. Rather, the rules "presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general."[10] Part of that context is the law defining when an attorney-client relationship arises, and its nature once it does: "[F]or purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."[11]

The attorney-client relationship in Wyoming is contractual.[12] It may, as any contract, arise by express agreement between a prospective client and a lawyer, or "[i]t may [be] implied from the conduct of the parties . . . ."[13] As a general matter, the parties to a contract must enter it freely and voluntarily. In the words of the Wyoming Supreme Court: "A contract assumes an agreement, a meeting of the minds, on the thing to be done . . . ."[14] The notion that one party can be forced into a contract undermines the entire concept of "an agreement." To say, as the Iowa State Bar Association does, that a lawyer may be ordered to represent someone because the

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[10] WYOMING RULES OF PROF'L CONDUCT, Scope 2 (2005).

[11] *Id.* at Scope 3.

[12] *Carlson v. Langdon*, 751 P.2d 344, 347(Wyo. 1988), (quoting *Chavez v. State*, 604 P.2d 1341, 1346 (Wyo. 1979)).

[13] *Id.*

[14] *Crockett v. Lowther*, 549 P.2d 303, 311 (Wyo. 1976).

lawyer is an "officer of the court" ignores the fundamental concept behind the attorney-client relationship. It is voluntary.

The Army opinion also glosses over the voluntary nature of the attorney-client relationship. On the one hand, the opinion concedes that "'[a] client has a right to discharge a lawyer with or without cause.'"[15] Further, the opinion states that "'[a] client seeking to release appointed counsel should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring the client to represent himself or herself . . . .'"[16] On the other hand, the opinion ignores the comment it quotes and concludes that Major Fleener "may be directed" to represent Mr. al-Bahlul.

Although the Wyoming Supreme Court has held that the attorney-client relationship is contractual, the court has not defined its elements. As a general matter, however, the attorney-client relationship consists of four elements: (1) a prospective client contacts a lawyer; (2) for the purpose of obtaining legal assistance; (3) the lawyer undertakes to provide the assistance or fails to clarify that he or she will not; and (4) the prospective client relies on that assistance or the failure to clarify the non-existence of the relationship.[17] None of those elements are present in this case.

To begin with, Mr. al-Bahlul did not contact Major Fleener, or anyone else, for the

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[15] DEPARTMENT OF THE ARMY, STANDARDS OF CONDUCT OFFICE MEMORANDUM ¶ 3 (January 6, 2006) (quoting Army Rule 1.16, cmt.).

[16] *Id.*

purpose of obtaining legal advice. Rather, Mr. al-Bahlul was ordered to have an attorney represent him. Major Fleener and his predecessors have endeavored to give legal advice to Mr. al-Bahlul, but he does not want it. It seems very unlikely, therefore, that he has relied or will rely on that advice.

As there is no express agreement between Major Fleener and Mr. al-Bahlul, the question becomes whether an attorney-client relationship between them arose by virtue of their conduct. It did not. Their conduct, especially that of Mr. al-Bahlul, indicates to the contrary. There is no attorney-client relationship between them.

If an attorney-client relationship is deemed to exist despite Mr. al-Bahlul's adamant posture to the contrary, Major Fleener is an agent for his client.[18] "[T]he relation of attorney and client is one of agency and the general rules of law that apply to agency apply to that relation."[19]

The law of agency imposes a variety of duties on attorneys, as agents. First, an agent has only those powers delegated to him by the principal, who is the client.[20] Accordingly, unless Major Fleener and Mr. al-Bahlul agree otherwise, Major Fleener, as agent, "is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected to the

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[17] *Togstad v. Vesely*, 291 N.W.2d 686, 693-94 (Minn. 1980).

[18] *Carlson*, 751 P.2d at 347 ("The general rules of agency apply to the establishment of the relationship.").

[19] *Bucher & Willis Consulting Eng'rs, Planners, and Architects v. Smith*, 643 P.2d 1156, 1158-59 (Kan. App.1982); *see also, State ex rel. Oklahoma Bar Ass'n v. Taylor*, 4 P.3d 1242, 1253, n. 39 (Okla. 2000) ("*Because the lawyer is his client's agent, the rules of agency govern much of the interaction of the lawyer with a client.*" (Emphasis in original)).

[20] *Cargill, Inc. v. Mountain Cement Co.*, 891 P.2d 57, 62 (Wyo. 1995) ("An agent may possess actual or apparent authority . . .").

agency."[21]

One of the most important concepts of the law of agency, from which flow an agent's obligations to a principal, is that the "law applicable to principal and agent . . . impose[s] the same obligations on the [agent] as are imposed upon a trustee in favor of his beneficiary."[22] The agent must, therefore, "represent and act faithfully on behalf of his principal."[23]

The only way Major Fleener can "represent and act faithfully on behalf" of Mr. al-Bahlul is to abide by his wishes, i.e., to not represent him. Major Fleener may not, therefore, ethically represent a client who does not want him as no attorney-client relationship is possible without the consent of the client. These legal rights and limitations are consistent with a lawyer's ethical duties.

The fundamental ethical principle which undergirds the attorney-client relationship is that a competent client, when properly advised, is, and should be, able to make any and all important decisions about the representation.[24] The decisions need not be "good" or wise. The Rules simply require that a lawyer "explain a matter [to a client] to the extent reasonably necessary to permit the client to make informed decisions . . . ." [25] The Rules' emphasis on the

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[21] RESTATEMENT (SECOND) OF AGENCY, § 387 (1958).

[22] *Hagar v. Mobley*, 638 P.2d 127, 138, n. 6 (Wyo. 1981).

[23] *Walter v. Moore*, 700 P.2d 1219, 1225 (Wyo. 1985).

[24] WYOMING RULES OF PROF'L CONDUCT, R. 1.14, cmt. 1 (2005) ("The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.").

[25] *Id.* at 1.4(b).

client, not the lawyer, making the decisions is one of the major themes of the Rules.

In interpreting the language of the Model Rules, the American Bar Association's Standing Committee on Ethics and Professional Responsibility ("the Committee") has opined that a client's right to make informed decisions about the representation extends to deciding whether to enter into an attorney-client relationship and on what terms.[26] In this case, therefore, Mr. al-Bahlul is entitled to receive enough information and explanation from Major Fleener to permit him to decide whether to enter into an attorney-client relationship with Major Fleener. With that right comes a correlative one: The right not to have an attorney one does not want. Similarly, a lawyer may not ethically represent a client who does not want him.

Mr. al-Bahlul's decision to proceed without counsel may not be a wise one. But that is not the question, at least from an ethical perspective. The ethical question is whether it is "an informed" decision. If so, Major Fleener is bound by it, as is Mr. al-Bahlul.[27] If not, Major Fleener has the duty to explain the consequences of the decision to Mr. al-Bahlul. Then the Major will be bound by the decision.

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[26] ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (Billing for Professional Fees, Disbursements and Other Expenses) (The principles of communication and informed decision-making incorporated in Rule 1.4(b) are "equally applicable to the lawyer's obligation to explain the basis on which the lawyer expects to be compensated, so the client can make one of the more important decisions 'regarding the representation.'").

[27] *See, e.g.,* WYOMING RULES OF PROF'L CONDUCT, R. 1.2(a) ("A lawyer shall abide by a client's decision concerning the objectives of the representation . . . ."); *Id.,* R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation . . . ."). Cf. *Faretta v. California*, 422 U.S. 806, 835 (1975) (A defendant's decision to forego the benefits of having counsel must be knowing and voluntary; the defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'"); *Williams v. State*, 655 P.2d 273, 274-75 (Wyo. 1982) (a defendant may be permitted to self-represent if he makes a knowing and intelligent decision to do so).

Both the Iowa opinion and the Army's opinion construe the provisions of Rule 1.16 which address declining or terminating representation (Wyoming has a similar rule.) Both the Iowa and Army rules, as the Wyoming rules, refer to a tribunal ordering a lawyer to "continue representation" of a client.

The plain meaning of the words to "continue representation" is that representation has begun. That, in turn, is dependent on the attorney-client relationship having been properly formed. As discussed above, that never happened. Mr. al-Bahlul has consistently declined to have Major Fleener represent him. It is disingenuous, therefore, to say that Major Fleener may ethically "continue" to represent Mr. al-Bahlul as there is no representation to continue. Rather, the Presiding Officer is directing Major Fleener to "begin" representing Mr. al-Bahlul. The opinions of the Iowa Bar and the Army are, therefore, seriously flawed, as the rules they interpret anticipate the continuation of representation after it has properly begun, not the initiation of representation over the objections of the client.

IV. Even if Major Fleener is Forced to Represent Mr. al-Bahlul, He is Bound By Mr. al-Bahlul's Objectives for the Representation.

To conclude, as have both Iowa and the Army, that an attorney may ethically be required to represent a client, does not eliminate the ethical dilemma Major Fleener faces. Saying that representation under such circumstances is ethically permissible, begs the question. The question is: What does it mean to "represent" a client who does not want an attorney?

A. A Client Has the Authority to Make All Important Decisions Regarding the Representation.

As noted above, the fundamental principle which undergirds the attorney-client relationship is that a competent client, when properly advised, is able to make any and all important decisions about the representation.[28] The decisions need not be "good" or wise. The Rules simply require that a lawyer "explain a matter to a client to the extent reasonably necessary to permit the client to make informed decisions . . . ."[29] The Rules' emphasis on the client, not the lawyer, making the decisions is one of the fundamental principles of the attorney-client relationship.

Perhaps the most important iteration of a client's primacy in the attorney-client relationship is found in Rule 1.2 (which is never mentioned in either the Iowa or Army opinions). Paragraph (a) mandates that, with some exceptions that are not relevant here, "a lawyer shall abide by a client's decisions concerning the objectives of the representation . . . and [a lawyer] shall consult with the client as to the means by which they are to be pursued."[30]

In this case, Mr. al-Bahlul has made his desires known, both to Major Fleener and the Presiding Officer. He has made an informed decision that he does not wish to enter into an attorney-client relationship with Major Fleener, or any other American lawyer, and that he wishes to proceed *pro se*. Further, he has decided to boycott the proceedings. Regardless of whether he, Mr. al-Bahlul, has a right to proceed *pro se*, he has the right to decide upon the

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[28] WYOMING RULES OF PROF'L CONDUCT, R. 1.14, cmt. 1 (2005) ("The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters.").

[29] *Id.* at 1.4(b).

[30] *Id.* at 1.2(a).

objectives of the representation. That is, he has the authority to decide about what Mr. Fleener should or should not do. Major Fleener is then ethically bound to follow those decisions.

"Representation" can take many forms. It can run the spectrum from actively appearing and advocating on behalf of a client before a tribunal (the Commission, in this case), to advising a client about how to appear *pro se*, and then not even appearing before the tribunal, acting, in other words, as "standby" counsel. What form representation should take depends on the client. The client, not the lawyer, and not the tribunal, has the authority to decide on the objectives of the representation. A client's decision to have his or her attorney play a "stand-by" role, while the client boycotts or appears *pro se*, is a perfectly legitimate decision, and, so long as it is an informed one,[31] is binding on the lawyer.[32] Saying that a lawyer is an "officer of the court" does not give the court, or other tribunal, authority to order something to the contrary for the simple reason that, with limited exceptions, a tribunal cannot order an attorney to do something that is not ethical.

The exception is that a tribunal may order an attorney to continue to represent a client when to do so would otherwise be a violation of the Rules of Professional Conduct or other law. That order, however, can only be to "continue representation" of a client. As discussed above, ordering continued representation does not authorize a lawyer to ignore the rules. Rather, a lawyer in such circumstances is not excused from obeying any of the rules. In particular, he still

[31] *See generally McKaskle v. Wiggins*, 465 U.S. 168 (1984) (recognizing that appointment of stand-by counsel to assist a pro se defendant is appropriate); *Faretta*, 422 U.S. 806, 834 n.46 (same). *See also Grandison v. Maryland*, 479 U.S. 873 (1986) (stand-by counsel appointed at pro se defendant's request). *Cf. Van Riper v. State*, 882 P.2d 230, 235 (Wyo. 1994) (a pro se defendant may, but is not required to be provided with stand-by counsel).

has the obligation to "abide" by a client's decisions regarding the objectives of the representation.[33]

Summary

It is one thing to order an attorney to "continue" to represent a client when ethical issues that would otherwise require withdrawal have arisen but the client and the attorney wish the representation to continue. The rules of Wyoming, Iowa, and the Army anticipate such a situation arising, and they all permit a tribunal to order the attorney to continue, notwithstanding an ethical problem. It is quite another for a tribunal to order a lawyer to represent a client who does not want the lawyer to represent him. The rules in Wyoming do not contemplate such a result, and such an order flies in the face of the fundamental principle that the attorney-client relationship is contractual, and a client is free to enter or not enter into the relationship.

Finally, to say that a lawyer must represent a client despite the client's wishes and that the lawyer can do so ethically, does not begin to answer the question of what it means to represent a client. Requiring a lawyer to represent a client does not excuse the lawyer from complying with the rules. As one of them is that a lawyer "shall abide" by the client's decisions regarding the objectives of the representation, Major Fleener must do just that. He must abide by Mr. al-Bahlul's decisions regarding the objectives of the representation.

Respectfully submitted this 3rd day of April, 2006.

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[32] WYOMING RULES OF PROF'L CONDUCT, R. 1.2(a) (2005).

[33] *Id.*

By: _____

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OFFICE OF MILITARY COMMISSIONS
DEPARTMENT OF DEFENSE
BEFORE THE PRESIDING OFFICER

UNITED STATES v. ALI HAMZA AHMED SULAYMAN AL BAHLUL, *Accused.* Date: March 29, 2006	MOTION OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE*

The National Institute of Military Justice ("NIMJ") respectfully moves for leave to file the instant brief as *amicus curiae* and to present oral argument.

INTEREST OF THE AMICUS CURIAE

NIMJ is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and improve public understanding of the military law system. NIMJ's officers and advisory board include law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers.

NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and has appeared in the United States Supreme Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, No. 05-184 (pending), and in the United States Court of Appeals for the District of Columbia Circuit in *Boumediene v. Bush*, No. 05-5062 (pending).

NIMJ is actively involved in public education through its website, www.nimj.org, and

through publications including the ANNOTATED GUIDE TO PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (LexisNexis 2002) and two volumes of MILITARY COMMISSION INSTRUCTIONS SOURCEBOOKS (2003-04). NIMJ has also sought to improve public understanding of military law by seeking release of comments on the rules governing military commissions. *National Institute of Military Justice v. Dep't of Defense*, Civil No. 04-312 (D.D.C.) (pending). NIMJ is independent of the government and relies exclusively upon private grants and donations for its programs.

ARGUMENT IN SUPPORT OF MOTION FOR LEAVE

The President's Military Order, the Secretary's Military Commission Orders, and the various Military Commission Instructions are currently silent on the issue of the appearance of *amici curiae* before the commission. However, Military Commission Instruction No. 9, dealing with the Review Panel, gives that body discretion to review *amicus* submissions. MCI No. 9, ¶ 4.C.4.c. This is "consistent with appellate practice in federal civil and military courts." Adele H. Odegard, Kevin J. Barry & Eugene R. Fidell, Discussion of MCI No. 9, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 2d 276 (2004).[1]

There is no reason such submissions should not also be entertained earlier in the military commission process.

Military commissions historically have followed court-martial principles of law, and rules of practice and procedure. Colonel Winthrop, the pre-eminent nineteenth-century military law historian and commentator, stated this succinctly:

[1] A proposed rule (POM XX, dated 22 March 2006) would permit submission of *amicus* briefs but prohibit oral argument by *amici*. By email on March 27, 2006, NIMJ objected to the portion that would prohibit oral argument. The rule is not currently in force and, if and when it is promulgated, should not include a ban on oral argument.

> In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of war [courts-martial], and, as their powers are not defined by law, their proceedings—as heretofore indicated—will not be rendered *illegal* by the omission of details required upon trials by courts-martial . . . . But, as a general rule and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will—like a court-martial. . . ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.[2]

The clear import is that military commissions have always followed generally the rules applicable in courts-martial of the current era,[3] and to ensure their legitimacy, military commissions in the 21st century ought similarly to be so guided. In keeping with contemporary American practice, the Court of Appeals for the Armed Forces and the service Courts of Criminal Appeals allow the filing of briefs by *amici*. C.A.A.F.R. 26; A.C.C.A.R. 15.4; A.F.C.C.A.R. 5.5; N.-M.C.C.A.R. 4-4k. In fact, *amici* commonly appear at all levels of the federal judicial system, from district courts to the Supreme Court of the United States. *See generally* Michael K. Lowman, Comment, *The Litigating Amicus Curiae: When Does the Party Begin after the Friends Leave?*, 41 AM. U. L. REV. 1243 (1992).

Absent some compelling reason to the contrary, military commissions also ought to welcome such submissions from entities that can usefully contribute to the analysis of significant legal and policy questions such as the one presented here.

Advocates of the military commission system maintain that it is full, fair, open, and

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[2] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 841-42 (2d ed. 1895, 1920 reprint) (emphasis in original) (footnotes omitted); *see also* Kevin J. Barry, *Military Commissions: Trying American Justice*, Army Law. 1 (Nov. 2003).

transparent. This commission's willingness to entertain *amicus* briefs will be consistent with those objectives and thereby foster greater public confidence in the administration of justice under the President's Military Order than has heretofore been achieved.

BRIEF AS *AMICUS CURIAE*

Argument

SELF-REPRESENTATION MUST BE PERMITTED

The universal rule in American jurisprudence is that a criminal defendant has a right to self-representation. Absent some compelling reason to the contrary, that rule should apply in these proceedings.

Any competent defendant in a civilian criminal trial has the right to represent himself. *Faretta v. California*, 422 U.S. 806 (1975). In court-martial practice, an accused also has the right to self-representation. This is spelled out in R.C.M. 506(d):

> The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding.

As the second sentence's waiver provision suggests, the Constitution does not require that a criminal defendant be competent to serve as his or her own counsel in order to proceed *pro se*; rather, the standard is whether the defendant is competent to waive the right to counsel. *Godinez v. Moran*, 509 U.S. 389, 399-400 (1993).

While a competent defendant would apparently have the right to waive counsel and self-represent in any criminal justice system in the United States, that right is apparently being denied

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[3] *See generally* Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, Army Law. 47, 48-49 (Dec. 2005).

to commission accused. Military Commission Order No. 1 (Aug. 31, 2005) provides that "[t]he Accused must be represented at all relevant times by Detailed Defense Counsel." MCO No. 1, ¶ 4.C(4). Military Commission Instruction No. 4 states: "Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself." MCI No. 4, ¶ 3.D(2).

The accused asked to represent himself when proceedings began in 2004. R. 4. In response to that request, the prosecution took the position that current military commission law does not permit the accused to represent himself. R.E. 101, Encl. 8, p. 44 of Vol. 7. The prosecution expressly stated in its brief (at 9):

> Rule I.16(c) of Navy Judge Advocate General Instruction 5803.1B (Professional Responsibility Instruction which requires continued representation when ordered by a tribunal or other competent authority notwithstanding good cause for terminating the representation). The Prosecution believes that an amendment to current Commission Law to permit self-representation is appropriate to bring the Commission in accord with the standard established for United States domestic courts as well as under Customary International Law.

In summary, the prosecution took the position that the accused should be allowed to represent himself, with detailed defense counsel serving as stand-by counsel. However, it was determined that an accused has no right to represent himself in military commissions.

After a stay resulting from Judge Robertson's decision in *Hamdan*, the *al Bahlul* case resumed in January 2006. At that time, the Presiding Officer ruled that the accused could not represent himself for two reasons: (1) he had expressed an intention to boycott the proceedings and therefore could not effectively represent himself (a determination that seems to run directly counter to the Supreme Court's analysis in *Godinez*, in which the Court made clear that the relevant issue was whether the defendant is competent to waive counsel, not whether he is competent to be his own lawyer); and (2) that the Appointing Authority had already determined

that there is no right to self-representation in the commission process.

NIMJ submits that the ruling in this case not only denies the accused a right applicable in every other criminal case conducted under American law, but it unduly compromises the independence of defense counsel and that counsel's ability to provide competent and effective representation.

It is bad enough that, directly contrary to the rationale in *Faretta*, military commission defense counsel are being forced on unwilling competent clients. But in addition, there is also an important subtlety that have may escaped notice in the process of seeking to implement the rule that requires the detailed defense counsel to participate against the accused's wishes: it is counsel's duty to promote the litigation goals of the client, not those assumed by the system. *See* ABA Model Rule 1.2A.

Under the current rule, it seems that defense counsel is forced to participate in pursuing an unstated rationale: that an uncooperative accused's litigation goal is necessarily to minimize the risk of conviction or minimize any adjudged confinement. Rather, an uncooperative accused's litigation goal may be to delegitimate the commission process in the eyes of the world community. A defense counsel who has been thrust upon an unwilling accused may have to advance *that* goal, rather than treating the case like a mock trial exercise and making arbitrary decisions about the accused's "best interest," as if detailed counsel were guardian *ad litem* for an incompetent client rather than the advocate for and agent of a competent accused. That issue, of course, is avoided if the competent accused is allowed to self-represent. *See, e.g., Torres v. United States*, 140 F.3d 392 (2d Cir. 1998).

Self-representation is a threshold legal issue of great importance to the integrity and viability of the commission system. It also implicates important philosophical questions, such as

the nature of the attorney-client relationship (agency v. guardianship) and the accused's right to vindicate his personal autonomy by choosing a legal strategy that may seem unwise from an objective standpoint, but that has a rational basis anchored in the accused's personal beliefs.

Rather than ensuring that these longstanding legal policy concerns that underlie a universal rule of American law are given effect, denying self-representation seems calculated to ensure that there always will be a counsel present on behalf of a defendant during the military commission proceedings, even when (contrary to another absolute rule of American criminal law) the defendant is not allowed to be present because the evidence being presented is classified. *See* Barry, *supra* note 2, at 6. This is a classic "two wrongs don't make a right" situation.

A higher goal than implementing a mere commission rule is at stake. The commission represents American justice on the world stage, and it is necessary and appropriate that rules inimical to our traditions and consistent American jurisprudence not be given effect. Prior contrary rulings should be reconsidered. This accused should be allowed to waive his right to counsel so long as he is competent to make that decision. The usual on-the-record-inquiry, as in guilty plea or other waiver contexts, should be conducted to ensure that the waiver of the right to counsel—and assertion of the right to self-representation—is knowing and voluntary. This will furnish a proper record for review by higher authority and the courts.

Respectfully submitted,

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Dated: March 29, 2006

UNITED STATES OF AMERICA	)	
	)	MOTION OF
	)	LT WILLIAM C. KUEBLER,
	)	JAGC, USN, FOR LEAVE TO FILE
v	)	BRIEF AS *AMICUS CURIAE* AND
	)	BRIEF AS *AMICUS CURIAE*
ALI HAMZA AL BAHLUL	)	
	)	4 April 2006

LT William C. Kuebler, JAGC, USN ("LT Kuebler") respectfully moves for leave to file the instant brief as *amicus curiae*.

INTEREST OF THE *AMICUS CURIAE*

LT Kuebler is assigned to the Office of the Chief Defense Counsel within the Office of Military Commissions. On 14 November 2005, LT Kuebler was detailed to represent Ghassan Abdullah Al Sharbi in connection with a charge referred for trial by Military Commission. To date, Mr. Al Sharbi has declined to meet with LT Kuebler and has indicated that he desires neither LT Kuebler's representation, nor the services of any other attorney. A ruling on the matter of self-representation by this Commission and/or the Appointing Authority upon certification as an interlocutory question, may therefore have a direct impact on Mr. Al Sharbi's case and LT Kuebler as detailed counsel in that case. Accordingly, LT Kuebler respectfully requests the opportunity to provide input to the Commission before it rules on this matter of wide-ranging significance. Please note, however, that because LT Kuebler does not currently represent Mr. Al Sharbi, he moves this Commission for leave to file as *amicus curiae* in his individual capacity, not as counsel for or on behalf of, Mr. Al Sharbi.

ARGUMENT IN SUPPORT OF MOTION FOR LEAVE

The legal issues presented by the first Military Commissions in over half a century are novel and complex, and, as has been noted elsewhere, "Commission Jurisprudence" is an inchoate and evolving body of law. The Commission can only benefit from multiple and diverse

points of view on these matters. As noted by the National Institute of Military Justice in its Motion for Leave to File Brief as *Amicus Curiae*, briefing by *amici curiae* in appropriate cases is an established part of military and federal practice. Accordingly, LT Kuebler respectfully requests leave to file the instant brief as *amicus curiae*.

BRIEF AS *AMICUS CURIAE*

Argument

A Full and Fair Trial Requires Respect for Certain Fundamental Rights.

A central question to be addressed in litigation before the Military Commissions is whether the President does, as the Government has contended elsewhere, possess plenary power to prescribe procedural (and other) rules for Military Commissions authorized under Article 21, UCMJ, or whether the PMO and other elements of "Commission Law" are subject to some higher set of "fundamental norms," e.g., the Constitution, federal statutes pertaining to "criminal prosecutions," or international law, which would serve to invalidate those provisions of Commission Law in conflict therewith. This is particularly significant in light of the judicial review provisions of the Detainee Treatment Act of 2005, which will likely require the Court of Appeals for the District of Columbia Circuit (and possibly the United States Supreme Court) to review proceedings conducted under MCO No. 1 for compliance with the "Constitution and laws of the United States," to the extent they apply. It is in the interest of all parties to these proceedings, including the Government, to deal with the prospect of such conflicts by avoiding them in the first instance.

The President's Military Order of 13 November 2001 ("PMO") provides a mechanism for avoiding conflicts between Commission Law and other relevant sources of law. The PMO requires each accused to be tried by Military Commission receive a "full and fair trial." While

the PMO delegates much of the President's authority to prescribe procedural rules for Military Commissions to the Secretary of Defense, there is no question that any rule or regulation promulgated under this authority must conform to the President's overarching command that Military Commission trials be "full and fair." *See* § 7B, MCO No. 1. To avoid conflicts between Commission Law and the Constitution and/or international law, fidelity to the PMO should be deemed to require the Commission to identify those basic trial rights that are recognized under the Constitution and international law as being essential to a fair trial. Moreover, the Manual for Courts-Martial ("MCM"), the most recent edition of which was issued by the President as an Executive Order *following* the promulgation of the PMO and MCO No. 1, requires adherence to court-martial rules of evidence and procedure (and applicable provisions of international law) absent a specific provisions to the contrary governing Military Commissions. *See* ¶ 2, Preamble, MCM (2005). By construing the PMO's requirement of a full and fair trial in a manner consistent with the Constitution and international law, and looking to the tried and tested provisions of the Rules for Courts-Martial where possible, Military Commissions will stand the best chance of holding up under judicial scrutiny and, perhaps, be viewed with some semblance of legitimacy by the world at large.[1]

Self-Representation is a Fundamental Trial Right.

The right to conduct one's own defense is protected by Sixth Amendment to the United States Constitution. *See Faretta v. California*, 422 U.S. 806 (1975). Moreover, the right is generally recognized and protected by statute in all "courts of the United States[,]" *see* 28 U.S.C. § 1654, and specifically in trials by courts-martial. *See* R.C.M. 506. Finally, the right of self-representation is an established part of international law. *See, e.g.*, ICCPR, Article 14(3d);

[1] As shown by the recent promulgation of Military Commission Instruction No. 10, even coordinate provisions of the PMO, i.e., its "probative value" standard for the admission of evidence, must give way to the requirement of a

AMCHR, Article 8(2)(d); CPHRFF, Article 6(3)(c). While certain provisions of MCO No. 1 are seemingly inconsistent with a right of self-representation, it is neither explicitly addressed nor denied by MCO No. 1. It is thus precisely the type of fundamental trial right the Commission should deem implicit in the requirement of a "full and fair trial" under the PMO.

Even if Denied the Right to Conduct His Defense Personally, the Accused Cannot be Forced to Accept Representation by an Unwanted Counsel.

Moreover, even if the accused is not afforded the right to conduct his own defense, it does not necessarily follow that the accused cannot waive counsel and proceed unrepresented. Such an approach is consistent with the plain language of R.C.M. 506:

> (d) *Waiver*. The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. . . . The military judge may require that a defense counsel remain present even if the accused waives counsel and conducts the defense personally. The right of the accused to conduct the defense personally may be revoked if the accused is disruptive or fails to follow basic rules of decorum and procedure.

R.C.M. 506(d).

The above-quoted provision dealing with waiver of counsel and the accused's right to conduct his own defense does not conflate or combine the two concepts, but rather keeps them distinct, i.e., it states that accused may waive counsel "*and*" conduct the defense personally on two occasions. On the third occasion the rule mentions the right to conduct the defense, it recognizes the power of the military judge to revoke the accused's right to "conduct the defense personally," but omits any mention of a concomitant power to revoke the accused's ability to waive counsel. The rule only gives power to the military judge to require counsel to "remain present," thereby implicitly recognizing the accused's ultimate right to reject the services of unwanted counsel and accept the consequence of not presenting a defense. Thus, military law

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"full and fair trial."

recognizes that no judge possesses the power to force a competent accused to accept the services of an unwanted attorney.

This is consistent with the fundamentals of attorney ethics. The Restatement (Third) of the Law Governing Lawyers recognizes two bases on which an attorney-client relationship is formed:

> A relationship of client and lawyer arises when:
>
> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>
> > (a) the lawyer manifests to the person consent to do so; or
> >
> > (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
>
> (2) a tribunal with power to do so appoints the lawyer to provide the services.

Restatement (Third) of the Law Governing Lawyers § 14 (2000).

While the Restatement recognizes the authority of *some* tribunals to create attorney-client relationships, neither instance mentioned in section 14 contemplates or condones a forced relationship. Comment g., discussing "nonconsensual relationships," provides:

> *g. Nonconsensual relationship: appointed counsel.* A lawyer may be required to represent a client when appointed by a court or other tribunal with power to do so. A lawyer may discuss the proposed representation with the prospective client and may give the court reasons why appointment is inappropriate or should be terminated.
>
> *The appointment may be rejected by the prospective client,* except for persons, such as young children, lacking capacity to make that decision. In the case of some parties, for example corporations and other entities, the party may appear in court only through a lawyer. *A court may require a criminal defendant to choose between an unwelcome lawyer and self-representation,* and in criminal cases standby or advisory counsel may be appointed when the defendant elects self-representation. When a court appoints a lawyer to represent a person, that person's consent may ordinarily be assumed absent the person's rejection of the lawyer's services.

Id. (emphasis added.)

The Restatement thus recognizes that the attorney-client relationship is a form of agency relationship and that one cannot, absent incapacity, be forced to vest an agent with authority to act on one's behalf: "The client-lawyer relationship ordinarily is a consensual one (see Restatement Second, Agency § 15). A client ordinarily should not be forced to put important legal matters into the hands of another or to accept unwanted legal services." Restatement (Third) of the Law Governing Lawyers § 14 cmt. b (2000).

Military practice is consistent with this approach. A line of cases recognizes that the mere act of detailing counsel does not, in and of itself, create an attorney-client relationship. Rather, the accused must accept the representation to give rise to an attorney-client relationship. *See, e.g., United States v. Williams*, 40 M.J. 809, 810-11 (A.C.M.R. 1994) ("An attorney-client relationship is not created by the mere designation (detail) of counsel. [citations.] If the accused has never consulted or communicated with the counsel, no attorney-client relationship is created."). *See also United States v. Brady*, 24 C.M.R. 266 (C.M.A. 1957); *United States v. Economu*, 2 M.J. 531 (A.C.M.R. 1975).

Brady, supra, is illustrative. In *Brady*, an accused in Stuttgart, Germany was represented by counsel of his choice. Before charges had been referred, the prosecutor notified the defense of an intention to conduct depositions of several witnesses 350 miles away in Paris, France. The defense objected and asked either that the depositions be conducted in Stuttgart or that the accused be allowed to travel to Paris. The convening authority rejected the request and appointed an officer to represent the accused at the Paris depositions. At trial, the defense unsuccessfully objected to the admission of the depositions in evidence, contending that the accused had been unrepresented, thereby

violating Article 49 of the UCMJ. Both the trial court and the board of review rejected the accused's position, but the Court of Military Appeals reversed. The court reasoned that in the absence of accused's consent and acceptance of counsel's representation, the accused had no attorney-client relationship with and could not be bound by the acts of his purported counsel. *See Brady*, 24 C.M.R. at 270.

The Army Court of Military Review came to a similar conclusion in *Economu, supra*. There, the convening authority appointed counsel to assist an accused in connection with post-trial review of his court-martial after the accused's previous counsel had left the Army. Detailed counsel did not contact the accused and returned the staff judge advocate's post-trial review without comment. The appellate court concluded that although detailed, because counsel had not been accepted by the accused, no attorney-client relationship was created and that the accused was not bound by counsel's submission. *See Economu*, 2 M.J. at 533. The court noted the "inherent right of refusal of a particular counsel by his client" and stated that "[t]o bind the accused, we feel there must be some semblance of acceptance on his part, as representation by total strangers is neither desirable nor fair." *Id.* (quoting *United States v. Miller*, 21 C.M.R. 149 (C.M.A. 1956)).

Based on the foregoing, there is no question that military practice is consistent with the "agency" approach of the Restatement. It is abundantly clear that the mere act of detailing simply makes counsel *available* to an accused, and, importantly, authorizes the formation of an attorney-client relationship. Absent acceptance by the accused, however, no attorney-client relationship is formed and counsel may not bind or otherwise act on behalf of the accused.

The Commission is Not a Tribunal With the Power to Appoint Counsel

This brings us to the question of whether a tribunal (the Commission in this case) may create an attorney-client relationship under the second basis cited in section 14 of the Restatement, i.e., appointment by a tribunal. While an attractive position at first blush, careful consideration of the question necessitates the conclusion that the answer is no.

The Commission, like courts-martial generally, lacks the power to appoint counsel. This is not a slight to the Commission; rather, it is because the system for appointing (or detailing) counsel under Commission Law is established in a manner consistent with general military practice. *Compare* R.C.M. 503 *with* MCI No. 4. Specifically, unlike civilian courts, which often appoint counsel for indigent defendants, detailing of counsel in military practice is accomplished through separate detailing authorities, e.g., Senior Defense Counsel of a Naval Legal Service Office. Nowhere does the UCMJ or the R.C.M. provide authority for a military judge to "appoint" counsel – not even, as shown above, under R.C.M. 506.

Like the UCMJ and the R.C.M., relevant provisions of Commission Law reserve detailing authority exclusively to the Chief Defense Counsel. *See* § 4C, MCO No. 1; MCI No. 4. Neither MCO No. 1 nor any other provision of Commission Law provides the Commission with the power to appoint counsel or otherwise "order" counsel to represent an unwilling accused. The Restatement provision cited above is simply inapposite to military practice generally, and Commission practice specifically, and provides no authority to a Presiding Officer who wishes to force an unwanted counsel on a Military Commission accused.

If the Commission Could Order Counsel to Represent an Accused, an Order to Conduct a Defense Contrary to the Wishes of the Accused Would Contravene Commission Law.

If the Commission could "appoint" counsel or create the bare outlines of an attorney-client relationship between counsel and an accused, any requirement to conduct a specific type of defense, or, indeed, a defense at all over the accused's objection, would contravene Commission Law. While MCO No. 1 provides that the accused must be "represented by counsel" at all relevant times, it goes on to suggest, in a number of provisions of Section 5, that the decision to conduct a defense rests entirely with the accused:

> D. At least one Detailed Defense Counsel shall be made *available* to the Accused sufficiently in advance of trial to prepare a defense . . . .
>
> H. The Accused *may* obtain witnesses and documents for the accused's defense . . . .
>
> I. The Accused *may* have Defense Counsel present evidence at trial in the Accused's defense and cross-examine each witness . . . .
>
> N. The Accused *may* have Defense Counsel submit evidence to the Commission during sentencing proceedings.

§ 5, MCO No. 1 (emphasis added).

The language from the foregoing provisions of MCO No. 1 is discretionary and obviously leaves it the *accused* to decide whether and how he wishes to have defense counsel mount a defense.

This is more than an academic point in light of the unprecedented and extraordinary denial of the right of self-representation. It is a perfectly rational response (or litigation goal) for an accused denied the right to conduct his own defense to avoid harm resulting from that denial. In this respect, it is important to bear in mind that the

injury or harm resulting from the denial of the right of self-representation is representation by an unwanted counsel. This is, of course, why the argument that the accused could not defend himself as well as counsel largely (if not completely) misses the point. The harm is not loss of ability to present a better defense – most would agree that the accused would probably not present as effective a defense as counsel. *Cf. Godinez v. Moran*, 509 U.S. 389, 400 (1993) ("[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts, [citation], a criminal defendant's ability to represent himself has no bearing upon his competence to *choose* self-representation." (emphasis in the original)). Rather, the harm the accused seeks to avoid is representation by an unwanted attorney. Assuming, *arguendo*, that the Commission can "order" counsel to represent an unwilling accused, the best way, from the accused's standpoint, to "mitigate" the resulting damage, may be for counsel do as little as possible on the accused's behalf. It goes without saying that as the accused's attorney, counsel in such a situation is bound to advance the lawful objectives of the representation as defined by the client. *See, e.g.,* Rule 1.2, JAGINST 5803.1C ("A covered attorney shall follow the client's well-informed and lawful decisions concerning case objectives[.]") There is no law requiring the accused in any criminal proceeding to mount a defense, and, as shown above, MCO No. 1 is quite consistent with the proposition that the accused has no obligation to do so in the context of Military Commissions.

Conclusion

The Commission should recognize the accused's right of self-representation as a necessary component of a full and fair trial. Barring this, the Commission should in no

event force an unwanted attorney on a Military Commission accused. Such action would place counsel in an untenable ethical dilemma, and is, in any event, beyond the authority of the Commission.

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Office of the Chief Defense Counsel
Office of Military Commissions
[redacted]
Arlington, VA 22202
[redacted]

UNITED STATES OF AMERICA v. ALI HAMZA AL BAHLUL	**Defense Submission of Additional *Voir Dire* Questions for the Presiding Officer** 5 April 2006

1. This submission is filed by the Defense in the case of the *United States v. Ali Hamza al Bahlul.*

2. **Timeliness:** In so far as challenging the Presiding Officer is akin to challenging a Military Judge for bias, this request is timely. These additional questions where gleaned from examining the transcripts of the March session. These questions must be answered in order for Mr. al Bahlul to receive a "full and fair" trial.

3. **Relief Requested**: The Defense submits the following additional questions to the Presiding Officer and requests they be answered. Defense further reserves the right to ask additional oral *voir dire* based on the Presiding Officer's answers.

4. **Additional Questions**:

A. Compare your current military salary (including BAH/BAS) to your previous salary prior to recall (military retired pay plus supplemental income from part-time jobs):

1) Is your current military salary greater or less than your previous salary prior to recall?

2) Do you currently receive any income or other monetary or non-monetary benefit other than your current military salary?

3) What zip code is your BAH based on?

4) Is your home located within the zip code identified in the answer to Question 3?

5) In addition to your current military salary, do you receive per diem other than that which is received because of travel to GTMO? If so, on what location is your per diem rate based?

6) You mentioned during original *voir dire* that you were attached to OMC. Do you currently work at OMC in Arlington, Virginia? If not, where do you work?

7) Are you considered to be TDY where you work?

8) Do you submit monthly accrual TDY vouchers?

9) On days when you are performing your duties at your home (the location of which you have refused to disclose on the record) do you receive TDY payments?

By: _____
Tom Fleener
MAJ, JA, USAR
Detailed Defense Counsel

UNITED STATES OF AMERICA	**D – 105; al Bahlul**
v.	**Prosecution Response** To Defense Motion To Proceed *Pro Se*; Right to Choice of Counsel
ALI HAMZA SULAYMAN AL BAHLUL	**6 April 2006**

1. **Timeliness**. This Prosecution response is being filed within the timeline established by POM 4-3.

2. **Relief.** The Defense motion should be denied.

3. **Overview**. Defense requests that al Bahlul be permitted to represent himself and to have his counsel of choice (a Yemeni). The rules do not permit either request, and the previous request to the Appointing Authority to allow *pro se* representation was denied.

4. **Facts**.

(1). The government accepts the facts as stated in the defense motion for the purposes of the motion.

5. **Legal Authority**.

a. Military Commission Order No. 1 (MCO No. 1) (REVISED 31 August 2005).

6. **Discussion**.

***a. Pro se* Representation.**
This issue has already been resolved against the defense position by the Appointing Authority, when the Appointing Authority denied al Bahlul's previous request for self-representation on 14 June 2005 (RE 101, pp. 113-14). The prosecution's position concerning self-representation at the time was extensively set forth in its brief, RE 101, pp. 36-45, dated 1 October 2004. This remains the prosecution's position. Regardless, the Appointing Authority has ruled *pro se* representation is not permitted, and said ruling is Commission law. The Presiding Officer may, pursuant to MCO No. 1, para. 4(5)(e), certify this as an interlocutory question to the Appointing Authority and seek a reconsideration of the rule against *pro se* representation, but the prosecution does not believe the Presiding Officer has the independent authority to explicitly overrule the Appointing Authority.

***b.* Counsel of Choice.**
The prosecution incorporates and asserts its discussion of this issue from its brief of 1 October 2004 (RE 101, pp. 36-45). The rules on who are acceptable as civilian counsel before the commission is set forth in MCO No. 1, 4(C)(3), are clear and unambiguous. A Yemeni lawyer who does not meet the required criteria is simply not acceptable under Commission law.

7. **Burdens**. As the movant, Defense bears the burden.

8. **Oral Argument**. If Defense is granted an oral argument, the Prosecution requests an oral argument in response.

9. **Witnesses and Evidence**.

a. No Prosecution witnesses are required for purposes of our response to the Defense motion.

b. Prosecution evidence in support of our response is the following:

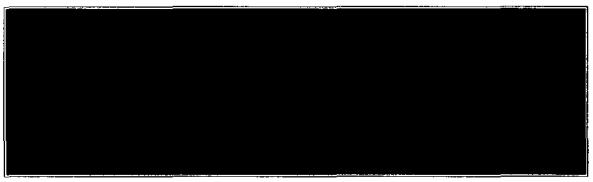
i. RE 101, pp. 36-45. Prosecution Response to Defense Memo for Self-Representation and Right to Choice of Counsel.

ii. RE 101, pp. 113-14. Appointing Authority Memorandum, 14 June 2005.

10. **Additional Information**. None.

11. **Attachments**. None.

12. **Submitted by**:



Prosecutor

Filings Inventory - US v. al Bahlul

PUBLISHED:

Issued in accordance with POM #12-1.
See POM 12-1 as to counsel responsibilities.

This Filings Inventory includes only those matters filed since 4 Nov 2005.

Prosecution (P designations)

Red indicates due dates.

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. R=Reference	RE
P -101: Motion to Compel Discovery	10 Mar 06	20 Mar 06		• Motion filed. Extension granted on defense response. • A. Defense response, 20 Mar 06	OR – 176 A - 178

Defense (D Designations)
Dates in red indicate due dates

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
(D 103: Motion to quash)	28 Feb 06	1 Mar	1 Mar	• A. Prosecution response. • B. Defense reply. • Note: Motion denied on the record, 2 Mar. Pending written findings.	OR – 161 A – 163 B - 170
D – 104 – Challenge of the Presiding Officer	27 Mar 06	31 Mar 06		• Motion filed. • A. Prosecution Response.	OR – 180 A - 182
D – 105: Motion to Proceed ProSe; Right to Choice of Counsel	30 Mar 06	6 Apr 06		• Motion filed. • A. Prosecution reply. • NOTE: Amicus, Wyoming lawyers. RE 186 • NOTE: Amicus, NIMJ, RE 187 • Note: Amicus, LT Kuebler, RE 188	OR – 181 A - 190

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE
PO 101 – Resumption of Proceedings Memo	• Sent to counsel 16 Nov by email; DC personally served at GTMO. • A. Prosecution calendar (para 7b, PO 101) • B. Defense reply and PO response (para 7c, PO 101), 16 Dec • C. Prosecution reply to para 7c, PO 101, 12 Dec • D. Defense response to PO directions (PO 101 B) and to PO 101, 19 Dec • E. DC email and PO Response, 20 Dec 05 •	OR - 102 A – 112 B – 123 C – 124 D -125 E – 126
PO 102 – Collection of Pro Se materials	• Sent to counsel 16 Nov by email; DC personally served at GTMO. • A. PO Email to MAJ Fleener and ALCON on case concerning duties of detail counsel and representation, 22 Nov 05 • B. PO email to CDC and DDC on DDC duties, 22 Nov 05. • C. DDC reply to PO 101 A, 28 Nov • D. CDC email about al Bahlul's desires as to counsel 1 Dec. • E. Draft request for opinion to SOCO for comment - 1 Dec 05. • F. Defense request for delay to submit comments and PO decision, 1 Dec 05. • G. PO request to SOCO for opinion, 6 DEC 05. • H. DC request for Opinion to Iowa Bar and enclosures. • I. SOCO opinion in response to PO 1 G. • J. DC request for SOCO opinion less enclosures (See APO	OR - 101 A - 113 B - 114 C - 115 D - 116 E - 117 F - 118 G – 119 H – 128 I – 129 J – 130 K – 141 L – 147 M – 148 N – 152 O - 158

	note on page 1) • K. PO 102 K - al Bahlul - PO request to CCMC to send matters to Iowa Bar (17 Jan 06) • L. PO request for copies of DDC request to withdraw and CDC denial of same, 24 Jan 06. • M. Items CCMC sent to Iowa Bar. • N. PO ruling on request to proceed pro se. • O. Opinion of Iowa Bar RE MAJ Fleener, 24 Feb 06. • NOTE: Received copy of DDC's withdrawal request dated 6 Jan 06 on 10 Mar 06. See RE 177.	
PO 103 - Docketing and Scheduling	• Announcement Jan 06 session, defense request for delay, PO decision - 1 Dec 05 • A. Announcement of Jan 06 session Specific times, 9 Dec 05. • B. Presence of LT [redacted] at Jan session. • C. Announcement of Feb trial term, 19 Jan 06 • D. Trial Order, 24 Jan 05 • E. Preparation for voir dire, 7 Feb 06 • F. PO response to defense voir dire questions, 24 Feb. • NOTE: DC requests extension on motions 2 Mar 06. See RE 169. • G. PO decision and trial schedule for motions, 2 Mar . Law motions due 18 April 06. • NOTE: Defense request for "global" extension and PO reply, 10 Mar. See RE 174. • Note: Defense request for continuance, prosecution reply, and PO decision (20 Mar 06). See RE 179. • Note: Defense submitted additional voir dire materials, 6 Apr 06, RE 189.	OR - 120 A - 121 B – 122 C – 143 D – 149 E – 155 F – 156 G - 171
PO 104 – Discovery	• Discovery Order, 24 Jan 06 • NOTE: Discovery Order Procedure for constructive service dates, 2 Mar. See RE 172. • A. Modification to Discovery Order	OR – 150 A - 173
PO 105 – Transcripts	• Service of Draft Session Transcript, 12 Jan 06	OR - 151

PROTECTIVE ORDERS

Pro Ord #	Designation when signed	Signed Pages	Date	Topic	RE
Pro Ord D is the first filing for ProOrds					
		2	9 Jul 04	Legal Advisor Protective Order - Classified Information	**108**
		2	30 Jun 04	Legal Advisor Protective Order – Unclassified Sensitive Information	**109**
		2	17 Mar 04	Legal Advisor Protective Order - Unclassified Sensitive Information	**110**
		1		PO Order on name of Translators	
	Protective Order # 1	1	23 Jan 06	ID of all witnesses	**144**
	Protective Order # 2	2	23 Jan 06	ID of investigators	**145**
	Protective Order # 3	3	23 Jan 06	FOUO and other markings	**146**

Prosecution (P designations)

Name	Motion Filed	Response	Reply	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference Notes	RE

Inactive Section

Defense (D Designations)

Designation Name	Motion Filed / Attachs	Response Filed / Attachs	Reply Filed / Attachs	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref=Reference	RE
D 101: Motion for an Order Preserving Potential Evidence	11 Jan 2006	18 Jan 06		• Motion filed. • A. Response filed • B Ruling by PO (Motion denied) 7 Feb 06	OR - 140 A – 142 B - 154
D 102: Motion for a continuance – Accused's medical Condition	28 Feb 06	1 Mar		• A. Prosecution response. • Motion withdrawn on the record, 2 Mar.	OR –160 A - 162
				•	
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Inactive Section

PO Designations

Designation Name (PO)	Status /Disposition/Notes 0R = First filing in series Letter indicates filings submitted after initial filing in the series. Ref =Reference	RE

AL BAHLUL
REVIEW EXHIBIT 192

Review Exhibit (RE) 192 are the Presiding Officer's Financial Records such as his Military Pay Statement.

The Presiding Officer has determined that RE 192 not be released on the Department of Defense Public Affairs web site. In this instance the Presiding Officer's right to personal privacy outweighs the public interest in this information.

RE 192 was released to the parties in the case in litigation, and will be included as part of the record of trial for consideration of reviewing authorities.

I certify that this is an accurate summary of RE 192.

//signed//

M. Harvey
Chief Clerk of Military Commissions